

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRADFORD G. BURBINE,

Petitioner, No. CIV S-04-1691 LKK EFB P

vs.

A. K. SCRIBNER, WARDEN,

ORDER AND  
FINDINGS & RECOMMENDATIONS

Respondent.

Petitioner is a state prisoner proceeding through counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges an October 31, 2001 judgment of conviction entered against him in the Solano County Superior Court on one count of continuous sexual abuse of a child under the age of 14, in violation of Cal. Penal Code § 288.5; and one count of committing a lewd act upon a child under the age of 14 years, in violation of Cal. Penal Code § 288(a).<sup>1</sup> He seeks relief on the grounds that: (1) he was denied due process and the right to a fair trial when the trial court ruled that the prosecutor could introduce inadmissible impeachment evidence; (2) his trial counsel rendered ineffective assistance; (3) he was denied due process and the right to confront the witnesses against him when the trial court

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<sup>1</sup> Petitioner was convicted of an additional count of a violation of Cal. Penal Code § 288(a), but that conviction was reversed on appeal. Pet., Ex. C.

1 admitted the hearsay testimony of the mother of one of the victims; (4) he was denied the right to  
2 notice of one of the charges against him; (5) he was denied due process as a result of the  
3 cumulative impact of the errors of his trial counsel; and (6) the trial court lacked jurisdiction to  
4 increase his sentence and committed multiple instances of sentencing error. Petitioner has also  
5 filed a request for evidentiary hearing. Upon careful consideration of the record and the  
6 applicable law, the undersigned denies the petitioner's request for an evidentiary hearing and  
7 recommends that petitioner's application for habeas corpus relief be denied.

8 **I. Procedural and Factual Background<sup>2</sup>**

9 During the summer of 1997, D.H., a four-year-old boy, spent the  
10 weekdays with his grandparents while his mother was at work.  
11 His grandparents lived on Plumb Street in Vacaville. Appellant  
12 and his family have also lived on Plumb Street in Vacaville for at  
13 least 16 years. While staying with his grandparents, D.H.  
14 sometimes went to appellant's house to see his big rig truck. On  
15 August 17, 1997, D.H. told his mother that appellant was his friend  
16 because he gave him candy. After his mother responded that "you  
17 can't like someone because he gave [you] candy," D.H. told her  
18 that appellant also "liked to pull his pants down." D.H.'s mother  
19 then asked what happened when his pants were pulled down, and  
D.H. pointed to his penis and answered that appellant "liked to  
tickle him." His mother called the police. She also told a neighbor  
on Plumb Street, Mallory D., who had a then 10-year-old son, J.V.

When Mallory D. heard about D.H.'s statements, her son J.V. was  
on a trip with appellant in his truck. J.V. often went with appellant  
on trips in his truck, which had bunk beds in the back where  
appellant and J.V. slept. When J.V. returned, his mother  
confronted him with what D.H.'s mother had told her. J.V.  
"became very evasive, and he just looked and he said no." She

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20 <sup>2</sup> This factual summary is divided into two parts. The first part is drawn from the April  
21 24, 2001, unpublished opinion by the California Court of Appeal for the First Appellate District  
22 at pgs. 2-5, appended as Exhibit C to the petition (hereinafter Opinion 1). This opinion was  
23 issued after petitioner filed his first direct appeal, which resulted in the reversal of one of  
24 petitioner's convictions and a remand for resentencing. The second part of the summary is  
25 drawn from *People v. Burbine*, 106 Cal.App.4th 1250, 1254-1255 (2003), at pgs. 2-4, appended  
26 as Exhibit D to the petition (hereinafter Opinion 2). That opinion was issued after petitioner  
filed an appeal of his sentence after remand. This court presumes that the state court's findings  
of fact are correct unless petitioner rebuts that presumption with clear and convincing evidence.  
28 U.S.C. § 2254(e)(1); *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004). Petitioner has  
not overcome the presumption with respect to the underlying events. The court will therefore  
rely on the state court's recitation of the facts.

asked if appellant had ever touched him, which he initially denied. She then told J.V. that "the police wanted to talk to him and that they were going to put him on a lie detector machine, and if he wasn't being honest, they would know." J.V. became hysterical, hung on to her, and said "it was all his fault, that he didn't know how to tell [her] what [appellant] had been doing to him for a long time." J.V. said he had been afraid to tell her because he thought she would get mad, he didn't want to upset her and he was "real embarrassed." His mother contacted the police.

J.V. testified that he began spending time with appellant when he was about seven and a half years old. He would spend the night at his house, go to the movies or park, and go on trips. His mother approved of the relationship, thinking "it was wonderful that [J.V.] had found a male figure that he could relate with [and] . . . fill that void that he no longer had with his father." When J.V. spent the night at appellant's house, which was up to five times a week, he would sleep with appellant in his bed. Appellant's wife slept in a separate bedroom.

One evening while sleeping in appellant's bed, J.V. woke up in the middle of the night because he felt appellant's mouth on his penis. His pajama bottoms had been pulled down, and appellant was to his side "like we made a figure 'L'." This happened "between 10 or 25" times, beginning when he was about eight and a half years old. When J.V. woke up while this was happening, he would pull up his pants and "scoot away." Appellant also touched J.V.'s penis with his hands between 20 or 30 times. This also happened while he was asleep, and would wake him up.

Appellant did the same things to J.V. while they were on truck trips. J.V. went on about 35 truck trips with appellant, and appellant touched J.V.'s penis with his hand on about half of those trips. Appellant also touched J.V.'s penis with his mouth 10 to 20 times in the truck. Appellant never said anything to him while it was happening or afterwards. J.V. did not remember the incidents where appellant would put his mouth on J.V.'s penis until after he had been seeing a counselor. He told a police officer it was like having "a dream inside of a dream."

J.V. had a friend, R.L., who met appellant through J.V. They would go to appellant's house together and watch television. Appellant's wife was there sometimes, but she stayed in her own bedroom with the door closed. Appellant once let R.L. drive a car while he sat on appellant's lap.

During the summer of 1997, J.V. and R.L., then 11 years old, had a camp-out in appellant's backyard. R.L. took a bath at appellant's house that night, and appellant watched him bathe. The boys came inside during the night because they were cold. They tried to sleep on the couch, but could not because it was too hard. They ended

1 up sleeping in appellant's bed with him, with R.L. next to  
2 appellant and J.V. on the outside. R.L. testified that nothing  
3 happened that night in bed, but that he did not recall if he had told  
4 a police officer that appellant tried to touch his penis in bed. R.L.  
5 also testified that appellant had J.V. put a condom on, and then had  
6 R.L. try it on. Appellant touched R.L.'s penis while the condom  
7 was on. To the best of his recollection, this happened on the night  
8 of the camp-out.

9 During the summer of 1997, R.L. went to appellant's house at  
10 other times. On occasions when he was at appellant's house,  
11 appellant reached inside R.L.'s pants "more than two times" and  
12 fondled his penis. One incident occurred in appellant's living  
13 room when J.V. was not there. On one of the days that appellant  
14 touched his penis, he also saw appellant touch J.V.'s penis.

15 A few weeks after he spent the night at appellant's house, R.L. told  
16 his mother that appellant was "weird because he walked around  
17 with his zipper unzipped and he wore no underwear . . ." A few  
18 moments later, he told his mother that appellant had touched him,  
19 after which she called the police. R.L. initially told the police  
20 nothing happened because he was scared.

21 D.S. also met appellant through his friend J.V. Once during the  
22 summer of 1997, when he was 11 years old, he went to appellant's  
23 house looking for J.V. J.V. was not there, but appellant was. D.S.  
24 walked into the garage and showed appellant some drawings he  
25 had done. Appellant pulled up the leg of his shorts about three  
26 times and "flashed" D.S., exposing his penis. D.S. left and never  
27 returned to appellant's home. The first person he told about the  
28 incident was J.V.'s mother, after he overheard a conversation  
29 between her and his mother about "something that they had heard  
30 on the news." He later told the police about the incident.

31 Appellant's defense was that the boys were lying to please their  
32 mothers, and that there was animosity between J.V.'s mother and  
33 the Burbine family. J.V.'s mother was a friend of appellant's wife  
34 until 1996, when she obtained a restraining order against her  
35 because "she tried to hit my son with her car." After the  
36 investigation of the charged incidents, she obtained a restraining  
37 order against appellant's adult children, Kimberly and Sean  
38 Burbine, because they were "stalking" her son and had thrown a  
39 firecracker in a wood pile in front of her house.

40 The defense also presented the testimony of appellant's son,  
41 daughter, and son-in-law, all of whom saw appellant with J.V. and  
42 didn't notice anything unusual. The defense also introduced the  
43 testimony of Melani Hansen, a friend of Sean Burbine's. She  
44 testified that she had been at the Burbine home on a number of  
45 occasions when D.H. was there. In August or September of 1997,  
46 she observed an incident in which appellant asked D.H. "if he had

1 used the bathroom . . . [and] . . . felt, like, the side of his leg by his  
2 knee and told him he needed to go home and change.”

3 Opinion 1 at 2-5.

4 Appellant Bradford Gary Burbine was found guilty by a jury of  
5 one count of continuous sexual abuse of a child (Pen.Code, §  
6 288.5)<sup>3</sup> and two counts of committing a lewd act on a child (§ 288,  
7 subd. (a)).<sup>4</sup> Each of the three counts involved a different victim.  
8 On the day of the original sentencing hearing, appellant submitted  
9 letters from his family and friends, to be considered in mitigation.  
10 The court declined to review the letters because they were not  
timely submitted. Rejecting the prosecutor's contention that  
appellant should receive the aggravated term for the continuous  
sexual abuse count, the court sentenced appellant to the middle  
term of 12 years for that count, and added two consecutive terms  
of 2 years each, representing one-third the middle term for each of  
the lewd act counts, for a total prison term of 16 years.

11 Appellant filed an appeal and a habeas corpus petition, which we  
12 considered together in *Burbine I*. Only three of the issues  
13 addressed in our prior opinion are relevant to the present appeal.<sup>5</sup>  
First, we held that the court's refusal to consider appellant's  
untimely letters in mitigation was not an abuse of discretion.  
Second, we held that even if appellant's counsel was ineffective in  
not presenting the letters in a timely fashion, there was no  
reasonable probability that consideration of the letters would have  
led to a lesser sentence, because the letters were premised on the  
view that appellant was not guilty, and thus were entitled to no  
weight in mitigation.

17 Third, and most significantly for the purpose of the present appeal,  
18 we accepted appellant's argument that his conviction on one of the  
19 lewd act counts was invalid, because the jury instructions on that  
particular act on which the conviction was based. We therefore  
20 reversed the conviction on that count only, and remanded the case  
for resentencing.

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21 <sup>3</sup> All further statutory references are to the Penal Code unless otherwise noted.  
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23 <sup>4</sup> The facts underlying appellant's convictions were set forth in our opinion on appellant's  
prior appeal and related habeas corpus petition. (*People v. Burbine* (April 25, 2001, A087714 &  
A092468) [nonpub. opn.] [Burbine I].) They are summarized here only insofar as they are  
relevant to the issues raised on this appeal.

25 <sup>5</sup> At appellant's request, we have taken judicial notice of the record and briefs in his prior  
26 appeal and related habeas corpus petition. (See Evid.Code, §§ 452, subd. (d)(1); 459, subd. (a).)

1 At the resentencing, the judge listed the materials he had reviewed  
2 in preparation for the hearing, and did not mention the letters in  
3 mitigation that appellant submitted for the original sentencing.  
When the judge asked whether there was anything else he should  
consider, appellant's counsel responded "No."

4 The prosecution's memorandum on resentencing requested that the  
court impose the upper term on both the principal and the  
5 subordinate counts, to run concurrently. At the hearing, appellant's  
6 counsel argued that the trial judge was precluded from  
reconsidering his original decision to impose the middle term on  
7 the continuous sexual abuse count, which had been designated as  
the principal term of appellant's sentence. The judge rejected this  
8 argument, reasoning that the original sentence had been "made up  
of inter-dependent [ sic ] components." He explained that he  
understood this court's remand to imply that he was "back to  
9 square one again" with regard to sentencing on the remaining  
counts.

10 The judge sentenced appellant to the same aggregate prison term  
11 originally imposed – 16 years – but reached this result by a  
different route than he had originally taken. Rather than imposing  
12 the middle term of 12 years for the continuous sexual abuse count,  
which he again selected as the principal term, he imposed the  
upper term of 16 years. He imposed the middle term of 6 years for  
13 the remaining lewd conduct subordinate term, but ordered it to run  
concurrently, rather than consecutively as it had in the original  
14 sentence.

15 In explaining his decision to impose the upper term on the  
16 principal term, the judge cited three aggravating factors. First, he  
noted that the term imposed for the subordinate count could have  
17 been consecutive (as, indeed, it had been on the original sentence),  
but that he was going to impose it concurrently. (See Cal. Rules of  
18 Court, rule 4.421(a)(7).)<sup>6</sup> Second, he stated that appellant's crimes  
had been "obviously planned and sophisticated" in that they  
19 involved "taking sexual advantage of young children with movies  
and buying them toys and other things . . . to insure that he  
20 remained in the child's good graces, . . . [and] to keep them from  
telling what is going on." (See rule 4.421(a)(8).) Finally, he noted  
21 that appellant "took advantage of a position of trust that he  
developed with these young children, taking them on rides on  
22 [appellant's big rig] truck, et cetera." (See rule 4.421(a)(11).)

23 Opinion 2 at 2-4.

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26 <sup>6</sup> All further references to rules are to the California Rules of Court.

1 **II. Analysis**

2 **A. Standards for a Writ of Habeas Corpus**

3 Federal habeas corpus relief is not available for any claim decided on the merits in state  
4 court proceedings unless the state court's adjudication of the claim:

5 (1) resulted in a decision that was contrary to, or involved an  
6 unreasonable application of, clearly established Federal law, as  
determined by the Supreme Court of the United States; or

7 (2) resulted in a decision that was based on an unreasonable  
8 determination of the facts in light of the evidence presented in the  
State court proceeding.

9 28 U.S.C. § 2254(d).

10 Under section 2254(d)(1), a state court decision is "contrary to" clearly established  
11 United States Supreme Court precedents "if it 'applies a rule that contradicts the governing law  
12 set forth in [Supreme Court] cases', or if it 'confronts a set of facts that are materially  
13 indistinguishable from a decision'" of the Supreme Court and nevertheless arrives at a different  
14 result. *Early v. Packer*, 537 U.S. 3, 8 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406  
(2000)).

16 Under the "unreasonable application" clause of section 2254(d)(1), a federal habeas  
17 court may grant the writ if the state court identifies the correct governing legal principle from the  
18 Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's  
19 case. *Williams*, 529 U.S. at 413. A federal habeas court "may not issue the writ simply because  
20 that court concludes in its independent judgment that the relevant state-court decision applied  
21 clearly established federal law erroneously or incorrectly. Rather, that application must also be  
22 unreasonable." *Id.* at 412; *see also Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (it is "not  
23 enough that a federal habeas court, in its independent review of the legal question, is left with a  
24 'firm conviction' that the state court was 'erroneous.'")

25 The court looks to the last reasoned state court decision as the basis for the state court  
26 judgment. *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002). Where the state court reaches a

1 decision on the merits but provides no reasoning to support its conclusion, a federal  
2 habeas court independently reviews the record to determine whether habeas corpus relief is  
3 available under section 2254(d). *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000).

4 **B. Petitioner's Claims**

5 **1. Evidentiary Rulings**

6 Petitioner raises two challenges to evidentiary rulings made by the trial court. Review of  
7 those rulings in this federal habeas proceeding is under a deferential standard.

8 **a. Legal Standards**

9 Absent some federal constitutional violation, a violation of state law does not provide a  
10 basis for habeas relief. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Accordingly, a state  
11 court's evidentiary ruling, even if erroneous, is grounds for federal habeas relief only if it renders  
12 the state proceedings so fundamentally unfair as to violate due process. *Drayden v. White*, 232  
13 F.3d 704, 710 (9th Cir. 2000); *Spivey v. Rocha*, 194 F.3d 971, 977-78 (9th Cir. 1999); *Jammal v.*  
14 *Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). Habeas petitioners are not entitled to habeas  
15 relief based on trial error unless they can establish that the error resulted in "actual prejudice,"  
16 which is defined as a "substantial and injurious effect or influence in determining the jury's  
17 verdict." *Brech v. Abrahamson*, 507 U.S. 619, 637 (1993).

18 **b. Evidence of Prior Conduct**

19 Petitioner's first claim is that his right to due process and a fair trial were violated when  
20 the trial court ruled that he could be cross-examined about a prior conviction involving  
21 homosexual activity with an adult male. Petitioner claims that he chose not to testify because of  
22 this ruling. He explains that if he had testified, "he would have denied the (trial) charges, and  
23 there was no forensic evidence to contradict him." Pet. at 4.

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1 Petitioner raised this claim in his first appeal, filed in 2001. The California Court of  
2 Appeal rejected the claim, reasoning as follows:

3 Appellant argues that the trial court in ruling prospectively that  
4 evidence of his arrest in 1990, for a lewd act in public involving  
5 another man and subsequent conviction,<sup>7</sup> would be admissible if  
6 appellant testified that he had no sexual interest in men. He  
maintains this evidence was inadmissible under Evidence Code  
sections 1008 and 352 as “propensity” evidence that was more  
prejudicial than probative.

7 The Attorney General correctly points out that “to raise and  
8 preserve for review the claim of improper impeachment with a  
prior conviction, a defendant must testify.” (*Luce v. United States*  
(1984) 469 U.S. 38, 43; *People v. Collins* (1986) 42 Cal.3d 378,  
383-384.) Here, after the court ruled on the prior conviction,  
appellant chose not to testify. We address the issue, however,  
because appellant also argues both that the ruling denied him his  
constitutional right to testify and that his attorney was ineffective  
in failing to suggest ways he could tailor his testimony to avoid  
impeachment.

12 Appellant first maintains that the trial court erred in concluding  
13 that evidence of his prior arrest and conviction could be admitted  
because it was inadmissible propensity evidence. This argument  
fails at the outset because the evidence was offered only for  
impeachment purposes, and only in the event appellant testified  
that he was not sexually attracted to men. The court initially ruled  
that evidence of appellant’s conviction would not be admissible  
under Evidence Code sections 1108 and 352 because it was more  
prejudicial than probative. During the defense case, appellant’s  
trial counsel moved to prevent the prosecutor from asking him  
questions about his “sexual proclivities.” The prosecutor informed  
the court that appellant had told a detective investigating the case  
that he had never had sexual interest in anyone other than adult  
women. The court ruled that if appellant chose to testify, the  
prosecutor could ask him questions about his sexual interests. If  
appellant were to testify that he had no sexual interest in males, the  
court would allow evidence of the prior lewd act involving a man  
to be used for impeachment purposes. As the court stated,  
“Otherwise, you are using this – my earlier analysis as a shield to  
perpetrate perjury, and that’s not going to happen. So I don’t  
know what more I can say, but it seems to me that inquiry on  
cross-examination into your client’s sexual behavior is relevant  
and admissible should he take the stand, because that’s one of the

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26 <sup>7</sup> Appellant pled to the lesser charge of disturbing the peace.

elements of this charge.”<sup>8</sup>

While the prior lewd act would be more prejudicial than probative as propensity and character evidence, if appellant testified that he had no sexual interest in males, it would then become probative of appellant's veracity. Where a witness has made blanket denials, it is proper to impeach that testimony with evidence of a specific act to the contrary because it is probative of the witness's credibility. (*People v. Senior* (1992) 3 Cal.App.4th 765, 778-779.) We find no error in conditionally admitting evidence of the prior lewd act for impeachment purposes only.

Appellant next claims that this ruling "effectively" prevented him from testifying, violating his constitutional right to do so. To the contrary, appellant chose not to testify. He could have testified and admitted a sexual interest in men, or he could have testified, denied such an interest, and disputed the underlying factual basis for the Berkeley arrest. The court's prospective ruling on what would be proper impeachment did not deny appellant his right to testify.

Opinion 1 at 5-6.

In his claim before this court, petitioner is challenging the trial court's ruling that he could be impeached with evidence of his prior conviction if he took the stand and denied ever having a sexual interest in a man. However, “[t]o raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify.” *Luce v. United States*, 469 U.S. 38, 43 (1984); *United States v. Olano*, 62 F.3d 1180, 1206 (9th Cir. 1995). The reason for this rule is that, without a transcript of an actual in-court exchange, a reviewing court must speculate as to the propriety of the cross-examination and/or any harm resulting therefrom. As the Supreme Court explained in *Luce*:

Any possible harm flowing from a district court's in limine ruling permitting impeachment by a prior conviction is wholly speculative. The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected

<sup>8</sup> Appellant does not argue that questions about whether he had a sexual interest in males would have been improper, though he did so at trial. The trial court ruled that the evidence was relevant to show absence of mistake or accident, given the incident involving appellant checking D.H.'s pants ostensibly to see if they were wet.

1       happens at trial, the district judge is free, in the exercise of sound  
2       judicial discretion, to alter a previous in limine ruling. On a record  
3       such as here, it would be a matter of conjecture whether the  
District Court would have allowed the Government to attack  
petitioner's credibility at trial by means of the prior conviction.

4       When the defendant does not testify, the reviewing court also has  
5       no way of knowing whether the Government would have sought to  
impeach with the prior conviction. If, for example, the  
6       Government's case is strong, and the defendant is subject to  
impeachment by other means, a prosecutor might elect not to use  
7       an arguably inadmissible prior conviction.

8       469 U.S. at 41-42.

9       Petitioner's description of his claim proves this point. He agrees that "if he could  
10      properly be asked about his interest in 'males,' and he denied that had such an interest, then he  
11      might be impeached with evidence of the incident." Pet. at 22. However, he argues that the  
12      prosecutor could not properly have asked him on direct examination about his interest in males  
13      because: (1) evidence that someone has a "propensity" to commit certain conduct "per se is not  
14      admissible;" (2) any question whether he had a sexual interest in males would be "too broad a  
15      question" because he was charged with molestation against male children and not males in  
16      general; and (3) any question about his sexual interest in males would constitute improper  
17      "impeachment on a collateral matter" because the prosecutor would be asking the question  
18      simply to bring up the prior conviction. *Id.* at 22-23. In the alternative, petitioner argues that  
19      there was "virtually no chance" that he would have been asked a proper question on direct  
20      examination about a sexual interest in males because "if petitioner or his attorney were on the  
21      ball, petitioner would not give such testimony, knowing that he would likely be impeached with  
22      evidence of that incident." *Id.* at 23. Finally, petitioner asserts that if he had testified "and  
23      neither admitted nor denied an interest in men," the prosecutor would have been unable to  
24      impeach him with evidence of his prior conviction. *Id.* at 24. Petitioner's speculation as to  
25      which questions might have been asked if he decided to testify, and what his responses might  
26      have been, does not allow the court to properly assess his claim and is insufficient to warrant

1 habeas corpus relief. Under *Luce* and *Olano*, petitioner has waived his challenge to the trial  
2 court's evidentiary ruling.

3 Even considered on the merits, the claim fails. Petitioner's right to due process and a fair  
4 trial were not violated by the trial court's ruling that his prior conviction for disturbing the peace  
5 could be admitted for impeachment purposes. In fact, petitioner concedes that such  
6 impeachment might be appropriate, depending on what transpired once he testified. *See* Pet. at  
7 22, 23. The trial court ruled, in essence, that evidence of petitioner's prior conviction could be  
8 admitted to prevent him from committing perjury should he choose to take the stand. This ruling  
9 did not render petitioner's trial fundamentally unfair. Petitioner has cited no case holding that  
10 the introduction of his prior conviction under these circumstances would be irrelevant or  
11 improper. This court agrees with the California Court of Appeal that there was no constitutional  
12 error "in conditionally admitting evidence of the prior lewd act for impeachment purposes only."  
13 Opinion 1 at 6.<sup>9</sup>

14 The court also rejects petitioner's argument that the trial court's evidentiary ruling  
15 prevented him from exercising his right to testify. Petitioner states that once he was informed he  
16 could be impeached with evidence of his prior conviction if he denied that he "liked boys," he  
17 decided not to testify. Pet. at 21. He argues that it was critical that he testify because "he was

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18         <sup>9</sup> In federal court, "evidence of a prior conviction may be admitted for impeachment  
19 purposes if the probative value out-weighs the prejudicial effect of admission." *United States v.  
20 Martinez-Martinez*, 369 F.3d 1076, 1088 (9th Cir. 2004). When balancing the probative value of  
21 evidence of a defendant's prior convictions against the evidence's prejudicial effect, a reviewing  
22 court is to consider: "(1) the impeachment value of the prior crime; (2) the point in time of the  
23 conviction and the witness' subsequent history; (3) the similarity between the past crime and the  
24 charged crime; (4) the importance of the defendant's testimony; and, (5) the centrality of the  
25 defendant's credibility." *United States v. Browne*, 829 F.2d 760, 762-63 (9th Cir. 1987). *See*  
26 also *United States v. Jimenez*, 214 F.3d 1095, 1098 (9th Cir. 2000). If a prior conviction is  
found to serve a proper impeachment purpose, it may be admitted despite its similarity to the  
offense at issue. *Martinez-Martinez*, 369 F.3d at 1088; *United States v. Hursh*, 217 F.3d 761,  
768 (9th Cir. 2000); *Browne*, 829 F.2d at 763. Further, "criminal defendants are not entitled to a  
false aura of veracity when they take the stand," and "when an accused elects to become a  
witness and testify in his own behalf, 'his credibility may be impeached, his testimony may be  
assailed, and is to be weighed as that of any other witness.'" *United States v. Portillo*, 633 F.2d  
1313, 1322 (9th Cir. 1980) (quoting *Reagan v. United States*, 157 U.S. 301, 305 (1895)).

1 the only witness who could refute the complainants' stories." *Id.* However, petitioner is  
2 speculating that he might have been asked whether he "liked boys." Further, the trial court ruled  
3 that petitioner could be impeached by his prior conviction only if he testified falsely. The  
4 content of petitioner's testimony was within his control. The court also notes that one of the  
5 exhibits attached to the petition is a letter from petitioner's trial counsel to petitioner's habeas  
6 counsel. Pet., Ex. E at consecutive p. 8. Therein, trial counsel makes the following  
7 representations:

8 As you are aware, I advised the client that he would  
9 be subject to impeachment if he testified. The court  
10 ruled that his prior statement to a police officer was  
11 admissible over my objection. This in turn raised  
12 an issue of credibility and an issue of about [sic] his  
13 prior conduct, which was previously excluded. In  
14 essence, the court held that if the defendant denied  
15 homosexual proclivities, it would allow the prior  
homosexual conduct evidence. If he admitted  
homosexual tendencies, the prior conduct *may* be  
excluded. We didn't discuss manipulating the  
testimony to avoid possible impeachment. The  
client made the decision not to testify in court as he  
was about to take the stand. I did not dissuade or  
encourage his decision.

16 I advised the client that he could testify or not. It  
17 was his decision and he understood the potential  
impeachment cross examination attack.

18 *Id.* Counsel's statements clarify that petitioner was advised it was up to him whether to testify  
19 and that he made an informed decision not to do so. Petitioner chose not to testify because he  
20 apparently believed that he stood to lose more by testifying, and therefore risking the admission  
21 of his prior conviction, than by remaining silent. As noted by the California Court of Appeal, he  
22 could have made the opposite choice. In light of these circumstances, petitioner cannot  
23 demonstrate that he was "forced" by the court's ruling not to testify. In any event, "[b]ecause an  
24 accused's decision whether to testify 'seldom turns on the resolution of one factor,' . . . a  
25 reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to  
26 testify." *Luce*, 469 U.S. at 42. Petitioner's exercise of his choice whether to testify under these

1 circumstances did not violate his constitutional rights.

2 For the foregoing reasons, petitioner is not entitled to habeas relief on his claims  
3 concerning the admissibility of his prior conviction.

4 **c. Hearsay Testimony**

5 Petitioner claims that he was denied his rights to due process and to confront the  
6 witnesses against him when the trial court admitted the hearsay testimony of the mother of one  
7 of the victims. He argues that when his trial counsel objected to the admission of this testimony,  
8 the judge should have “sustained the objection, held a hearing, and taken evidence on the  
9 reliability of the statements.” Pet. at 38. Petitioner contends that if the trial judge had done so,  
10 he would have found the statements unreliable and “would then have seen it would be erroneous  
11 to admit the hearsay testimony because it did not meet the statutory requirements for admission  
12 set out in California Evidence Code section 1360.” *Id.*

13 The California Court of Appeal rejected this claim in its opinion on petitioner’s first  
14 appeal. The court reasoned as follows:

15 Appellant claims that the court erred in admitting the portion of  
16 D.H.’s mother’s testimony in which she stated that her son D.H.  
17 pointed to his penis and told her that appellant “liked to pull his  
18 pants down . . . [and] . . . tickle him.” He argues that the  
19 statements are inadmissible under Evidence Code section 1360 for  
three reasons. He maintains that the court erred in failing to hold a  
hearing, that the testimony did not have “sufficient indicia of  
reliability,” and that D.H. was “essentially” unavailable for cross-  
examination.”

20 Evidence Code section 1360 provides in part that: “In a criminal  
21 prosecution where the victim is a minor, a statement made by the  
22 victim when under the age of 12 describing any act of child abuse  
23 . . . is not made inadmissible by the hearsay rule if all of the  
24 following apply: [¶] (1) The statement is not otherwise admissible  
25 by statute or court rule. [¶] (2) The court finds, in a hearing  
conducted outside the presence of the jury, that the time, content,  
and circumstances of the statement provide sufficient indicia of  
reliability. [¶] (3) The child either: [¶] (A) Testifies at the  
proceedings. [¶] (B) Is unavailable as a witness, in which case the  
statement may be admitted only if there is evidence of the child  
abuse or neglect that corroborates the statement made by the  
child.”

1 Here, appellant's trial counsel objected to the testimony of D.H.'s  
2 mother on hearsay and foundational grounds. The trial court held  
3 an off-the-record discussion with counsel, and then allowed the  
4 testimony. While there is no record of the factors considered by  
5 the trial court, “[a] ruling on the admissibility of evidence implies  
6 whatever finding of fact is prerequisite thereto . . . .” (Evid. Code,  
7 § 402, subd. (c).) The court in *People v. Brodit, supra*, 61  
8 Cal.App.4th 1312 considered a similar situation, in which the child  
9 victim told a number of witnesses that she had been molested. The  
10 trial court held a hearing regarding the testimony of only one of the  
11 witnesses, and “[n]o further section 402 hearings were requested or  
12 held.” (*Id.* at p. 1328.) Nevertheless, the *Brodit* court considered  
13 the indicia of reliability of the evidence and concluded that the  
14 statements made by the victim to all of the witnesses were properly  
admitted. (*Id.* at pp. 1328-1330.)

9 We likewise consider the indicia of reliability of D.H.'s statement  
10 to his mother. The *Brodit* court utilized the factors enumerated by  
11 our Supreme Court in a case involving a judicially created hearsay  
12 exception for child dependency cases modeled, in part, on the  
13 statutory requirements of Evidence Code section 1360. (*In re*  
14 *Cindy L.*) (1997) 17 Cal.4th 15, 29-30.) Those factors are: “(1)  
spontaneity and consistent repetition; (2) mental state of the  
declarant; (3) use of terminology unexpected of a child of similar  
age; and (4) lack of motive to fabricate.” (*People v. Brodit, supra*,  
61 Cal.App.4th at pp. 1329-1330, citing *In re Cindy L., supra*, 17  
Cal.4th at pp. 29-30.)

15 Here, D.H. spontaneously made the statement to his mother that  
16 appellant was his friend because he gave him candy. When his  
17 mother responded that giving candy did not make someone your  
18 friend, D.H. volunteered that appellant also liked to pull his pants  
19 down. His mother asked the non-leading question, “what  
20 happened when [your] pants were pulled down?” D.H. pointed to  
21 his penis and responded that appellant would tickle him. The  
22 series of statements were spontaneously made, even though the last  
23 one was in response to a question. D.H. was not being questioned  
24 about a suspected incident, but was simply conversing with his  
mother. Likewise, D.H. had no motive to fabricate. He considered  
appellant to be his friend, and was telling his mother some things  
that, in his experience, “friends” do. D.H. obviously had no idea  
that his revelation would result in any sort of recrimination for his  
“friend.” His lack of awareness of the inappropriateness of the  
behavior and his description of it as “tickling” demonstrates that  
his mental state was one of complete innocence, with no motive to  
fabricate. Because the record demonstrates sufficient indicia of  
reliability, we find that the testimony was properly admitted.

25 Appellant also claims that Evidence Code section 1360, both  
26 “generally, and as applied [here],” is an unconstitutional  
deprivation of his right to confront witnesses. We reject this

1 argument first because D.H. testified and was available for cross-  
2 examination, even though the six-year-old could not remember the  
3 incident which occurred about two years earlier. The  
4 confrontation clause of the Sixth Amendment “includes no  
5 guarantee that every witness called by the prosecution will refrain  
6 from giving testimony that is marred by forgetfulness, confusion,  
7 or evasion. To the contrary, the Confrontation Clause is generally  
8 satisfied when the defense is given a full and fair opportunity to  
probe and expose these infirmities through cross-examination . . .  
.” (*Delaware v. Fensterer* (1985) 474 U.S. 15, 21-22.)  
Appellant’s trial counsel had the opportunity to cross-examine  
D.H., and chose not to. The six-year-old’s inability to remember  
anything about the incident certainly could have been exploited  
effectively on cross-examination. We find no violation of the  
confrontation clause.

9 Opinion 1 at 8-10.

10 Petitioner claims that the admission of D.H.’s statements through the testimony of his  
11 mother did not meet the statutory requirements for admission set forth in Cal. Evid. Code § 1360  
12 and violated his rights to due process and confrontation of the witnesses against him. Pet. at 38.  
13 He also claims that the trial court should have held a hearing to determine the reliability of the  
14 statements made by D.H. to his mother. *Id.* at 41-42. Petitioner argues that D.H. was essentially  
15 unavailable for cross-examination because he was unable to remember any acts of molestation or  
16 any of his prior statements to his mother.

17 The state appellate court’s conclusion that the testimony of D.H.’s mother met the  
18 requirements for admissibility set forth in Cal. Evid. Code § 1360 is binding on this court. *See*  
19 *Estelle*, 502 U.S. at 67-68 (a federal writ is not available for alleged error in the interpretation or  
20 application of state law); *Aponte v. Gomez*, 993 F.2d 705, 707 (9th Cir. 1993) (federal courts are  
21 “bound by a state court’s construction of its own penal statutes”); *Oxborrow v. Eikenberry*, 877  
22 F.2d 1395, 1399 (9th Cir. 1989) (a federal habeas court must defer to the state court’s  
23 construction of its own penal code unless its interpretation is “untenable or amounts to a  
24 subterfuge to avoid federal review of a constitutional violation”). Accordingly, petitioner’s  
25 arguments regarding the trial court’s failure to comply with the requirements of that code section  
26 should be rejected.

1 Petitioner's claim that Cal. Evid. Code § 1360 is unconstitutional as applied, in violation  
2 of his right to confrontation, should also be denied. D.H. testified at trial and was subject to  
3 cross-examination. For this reason, even though the trial court did not explain on the record  
4 whether there were adequate indicia of reliability to warrant admission of the statements of  
5 D.H.'s mother, petitioner's rights under the Confrontation Clause were not violated. *See*  
6 *California v. Green*, 399 U.S. 149, 157-64 (1970) (the admission of hearsay statements did not  
7 violate the defendant's Confrontation Clause rights because the declarant was available at trial  
8 for cross-examination); *United States v. Valdez-Soto*, 31 F.3d 1467, 1470 (9th Cir.1994) ("We  
9 are aware of no Supreme Court case, or any other case, which holds that introduction of hearsay  
10 evidence can violate the Confrontation Clause where the putative declarant is in court, and the  
11 defendants are able to cross-examine him"). This is true even though D.H. could not remember  
12 the details of the abuse that he had described to his mother. *See United States v. Owens*, 484  
13 U.S. 554, 557 (1988) ("This Court has never held that a Confrontation Clause violation can be  
14 founded upon a witness' loss of memory); *Delaware v. Fensterer*, 474 U.S. 15, 21-22 ("The  
15 Confrontation Clause includes no guarantee that every witness called by the prosecution will  
16 refrain from giving testimony that is marred by forgetfulness, confusion, or evasion . . . [t]o the  
17 contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair  
18 opportunity to probe and expose these infirmities through cross-examination, thereby calling to  
19 the attention of the factfinder the reasons for giving scant weight to the witness' testimony");  
20 *Valdez-Soto*, 31 F.3d 1467, 1470-71 (9th Cir.1994) (no violation of the Confrontation Clause  
21 even though witness could not remember or recanted some of his earlier statements). "[T]he  
22 Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not  
23 cross-examination that is effective in whatever way, and to whatever extent, the defense might  
24 wish.'" *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987)(quoting *Fensterer*, 474 U.S. at 20  
25 (emphasis added)).

26 ////

1 Petitioner's trial counsel made a tactical decision not to vigorously cross-examine D.H.  
2 after he testified he couldn't remember details about the molestation. In fact, petitioner used  
3 D.H.'s lack of memory to his advantage in closing argument. He argued that there was no  
4 evidence that petitioner molested D.H. because D.H. "wouldn't testify" and "wouldn't say a  
5 word about it." (Reporter's Transcript on Appeal (RT) at 216-17.) Because this court finds no  
6 Confrontation Clause violation after an independent review of the record, the court concludes  
7 that the state courts' decision with regard to petitioner's Confrontation Clause claim was not an  
8 unreasonable application of United States Supreme Court law.

9 Petitioner's due process claim also fails. Under the circumstances presented here, where  
10 D.H. testified, and both he and his mother were available for cross-examination, the admission of  
11 D.H.'s statements to his mother was not "so extremely unfair that its admission violates  
12 fundamental conceptions of justice." *Dowling v. United States*, 493 U.S. 342, 352 (1990)  
13 (internal quotation marks and citation omitted). Thus, the state courts' conclusion that  
14 petitioner's due process rights were not violated was not unreasonable under AEDPA.

15 **2. Ineffective Assistance of Counsel**

16 Petitioner claims that his trial counsel rendered ineffective assistance through numerous  
17 errors. After setting forth the applicable legal principles, the court will evaluate these claims in  
18 turn below.

19 **a. Legal Standards**

20 The Sixth Amendment guarantees the effective assistance of counsel. The United States  
21 Supreme Court set forth the test for demonstrating ineffective assistance of counsel in *Strickland*  
22 *v. Washington*, 466 U.S. 668 (1984). To support a claim of ineffective assistance of counsel, a  
23 petitioner must first show that, considering all the circumstances, counsel's performance fell  
24 below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88. After a  
25 petitioner identifies the acts or omissions that are alleged not to have been the result of  
26 reasonable professional judgment, the court must determine whether, in light of all the

1 circumstances, the identified acts or omissions were outside the wide range of professionally  
2 competent assistance. *Id.* at 690; *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Second, a  
3 petitioner must establish that he was prejudiced by counsel's deficient performance. *Strickland*,  
4 466 U.S. at 693-94. Prejudice is found where "there is a reasonable probability that, but for  
5 counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at  
6 694. A reasonable probability is "a probability sufficient to undermine confidence in the  
7 outcome." *Id.* See also *Williams*, 529 U.S. at 391-92; *Laboa v. Calderon*, 224 F.3d 972, 981  
8 (9th Cir. 2000). A reviewing court "need not determine whether counsel's performance was  
9 deficient before examining the prejudice suffered by the defendant as a result of the alleged  
10 deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of  
11 sufficient prejudice . . . that course should be followed." *Pizzuto v. Arave*, 280 F.3d 949, 955  
12 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 697).

13 In assessing an ineffective assistance of counsel claim "[t]here is a strong presumption  
14 that counsel's performance falls within the 'wide range of professional assistance.'" *Kimmelman*  
15 *v. Morrison*, 477 U.S. 365, 381 (1986) (quoting *Strickland*, 466 U.S. at 689). There is in  
16 addition a strong presumption that counsel "exercised acceptable professional judgment in all  
17 significant decisions made." *Hughes v. Borg*, 898 F.2d 695, 702 (9th Cir. 1990) (citing  
18 *Strickland*, 466 U.S. at 689). However, that deference "is predicated on counsel's performance  
19 of sufficient investigation and preparation to make reasonably informed, reasonably sound  
20 judgments." *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc).

21 **b. Failure to Advise Petitioner to Testify**

22 Petitioner argues that his trial counsel rendered ineffective assistance because he failed to  
23 advise petitioner that he could testify at his trial without risking impeachment with his prior  
24 conviction for disturbing the peace. Pet. at 26. Petitioner suggests that he "could have testified  
25 on direct examination without stating whether he had or did not have an interest in 'males,' and  
26 then, if the prosecutor asked him if he had such an interest, he could have answered that he did

1 have an interest in adult males in the past, but he never had an interest in male children.” *Id.* at  
2 26-27. Petitioner also suggests that he could have testified on direct examination that “I’m  
3 happily married, but for a while in the past I was attracted to a man.” *Id.* at 31. He argues that  
4 trial counsel’s failure to advise him to testify in this manner constituted deficient performance  
5 and resulted in prejudice.

6 As described above, petitioner submitted as an exhibit a letter from his trial counsel,  
7 wherein counsel explains that he informed petitioner he was subject to impeachment with his  
8 prior conviction if he took the stand and “denied homosexual proclivities.” Pet., Ex. E at  
9 consecutive p. 8. Trial counsel apparently did not make any suggestions as to how petitioner  
10 could testify and still avoid impeachment with his prior conviction, perhaps because there could  
11 be no guarantee that any particular strategy would work. In that regard, one must not lose sight  
12 of the overarching principle that a witness must testify truthfully. Petitioner has filed his own  
13 declaration, in which he states that his trial counsel did not advise him that he could “testify that  
14 I had once had an interest in a man but no longer did, and that this interest did not and never did  
15 extend to boys.” Pet., Ex. F. Petitioner further provides the declaration of Michael P. Thorman,  
16 a specialist in criminal law, who states that he would have advised petitioner to testify that he  
17 “previously had a sexual interest in adult men but does not and never did have a sexual interest  
18 in boys.” Pet., Ex. G at 2. Mr. Thorman opines that “competent defense counsel always  
19 recommends that the defendant testify in a case alleging child molestation if the defense is  
20 seeking an acquittal.” *Id.*

21 The California Court of Appeal rejected this claim of ineffective assistance of counsel,  
22 reasoning as follows:

23 Appellant also raises, in his habeas petition, the issue of ineffective  
24 assistance of counsel based on his trial attorney’s failure to advise  
25 him that he could have avoided impeachment by testifying to being  
26 sexually attracted to men in the past, but never to boys. He  
suggests that he could have testified to “something like, ‘I’m  
happily married, but for a while in the past I was attracted to a  
man.’” This statement, appellant claims, would have prevented his

1 impeachment with the prior conviction but still allowed him to  
2 testify. Appellant also submits the declaration of Michael P.  
3 Thorman, a certified specialist in criminal law, with his petition for  
4 writ of habeas corpus. Mr. Thorman states that, under the  
5 circumstances, he would have advised appellant to truthfully  
6 testify that he had a prior sexual interest in adult men, but never in  
7 boys. He opines that "this is a distinction a jury would readily  
8 understand, and that the 1991 [sic] conviction would therefore  
9 have little likelihood of demonstrating Mr. Burbine was disposed  
10 to commit the charged offenses."

11 In order to demonstrate ineffective assistance of counsel, a  
12 defendant must show that counsel's performance was inadequate  
13 when measured against the standard of a reasonably competent  
14 attorney, and that counsel's performance prejudiced defendant's  
15 case in such a manner that his representation "so undermined the  
16 proper functioning of the adversarial process that the trial cannot  
17 be relied on as having produced a just result." (*Strickland v.*  
18 *Washington* (1984) 466 U.S. 668, 686.) "In determining whether  
19 counsel's performance was deficient, a court must in general  
20 exercise deferential scrutiny [citation]" (*People v. Brodit* (1998)  
21 61 Cal.App.4th 1312, 1335, citing *People v. Ledesma* (1987) 43  
22 Cal.3d 171, 216.) "Although deference is not abdication, . . .  
23 courts should not second-guess reasonable, if difficult, tactical  
24 decisions in the harsh light of hindsight." (*People v. Brodit*,  
suprs, 61 Cal.App.4th 1312, 1335, citing *People v. Scott* (1997) 15  
Cal.4th 1188, 1212.)

25 While Mr. Thorman believes that a jury would "readily  
26 understand" an admission by appellant that he was sexually  
attracted to men "in the past," it is fair to say that reasonable minds  
could differ on this issue. This is precisely the type of tactical  
decision that should not be second-guessed by an appellate court.  
The trial attorney, who was in a position to observe the jurors  
during voir dire and to see their reactions to the evidence offered  
by the prosecution, certainly could have reached the reasonable  
conclusion that any type of testimony by Mr. Burdine about sexual  
attraction to men would be harmful to his defense. Moreover, we  
note that the proposed testimony still may have left appellant open  
to impeachment with his prior inconsistent statement in which he  
told the detective that he was only sexually attracted to adult  
women. Finally, we note that appellant never states that the  
suggested tailored testimony is accurate. His carefully worded  
declaration states only that he would have given the tailored  
testimony if he had been so advised. We find no ineffective  
assistance of counsel in failing to recommend the suggested  
testimony.

27 Opinion 1 at 7-8.

28 ////

1       The California Court of Appeal concluded that petitioner's trial counsel may have made a  
2 tactical decision to keep petitioner off the witness stand after considering the prejudice that  
3 would ensue if petitioner was impeached with his prior conviction. The appellate court also  
4 noted that petitioner could still be impeached with his prior conviction even if he testified as he  
5 now describes. As set forth above, petitioner's trial counsel has explained that he advised  
6 petitioner he could be impeached with his prior conviction if he took the stand, and then left it up  
7 to petitioner to decide whether to testify or not. Counsel states that he did not "dissuade or  
8 encourage" petitioner's decision in this regard. Pet., Ex. E at consecutive p. 8.

9       Petitioner has failed to demonstrate either deficient performance or prejudice arising  
10 from his trial counsel's actions. Considering the uncertainty with regard to the nature of the  
11 prosecutor's questions on cross examination, the nature of the testimony petitioner might have  
12 given, and the possible prejudice to petitioner if his prior conviction was introduced to impeach  
13 his testimony, counsel's decision to inform petitioner of the possible ramifications of testifying  
14 and then to leave it up to him whether to testify was certainly not "outside the wide range of  
15 professionally competent assistance." *Strickland*, 466 U.S. at 690. Petitioner was required to  
16 testify truthfully, and counsel cannot be faulted for failing to tell petitioner exactly what to say  
17 on the stand with regard to his sexual preferences.

18       Petitioner has also failed to demonstrate prejudice. For the reasons expressed by the  
19 California Court of Appeal, petitioner's proposed testimony carried certain risks, was not wholly  
20 credible, and would not necessarily have prevented the introduction of petitioner's prior  
21 conviction in any event. In short, under the circumstances presented here, petitioner cannot  
22 show that, but for counsel's failure to suggest that petitioner testify as he describes in his  
23 petition, the result of the proceedings would have been different. Accordingly, petitioner is not  
24 entitled to relief on this claim.

25       ////

26       ////

**c. Failure to Object to the Testimony of D.H.'s Mother**

Petitioner claims that his trial counsel rendered ineffective assistance because of his failure to make “a more specific objection” to the testimony of D.H.’s mother on the ground of lack of foundation, and his complete failure to object to this testimony on Confrontation Clause grounds. Pet. at 52. The California Court of Appeal denied this claim, reasoning as follows:

Appellant also argues that his trial attorney was ineffective because he failed to make a more specific objection to D.H.'s mother's testimony on lack of foundation grounds and he failed to object on confrontation clause grounds. Neither claim has merit. As discussed above, because appellant had the opportunity to cross-examine D.H., there was no basis for an objection on confrontation clause grounds. Appellant also suggests that a more specific foundational objection would have resulted in a hearing and finding that D.H.'s statements to his mother were unreliable and inadmissible. To the contrary, we have determined that D.H.'s statements had sufficient indicia of reliability. We find no reasonable probability that D.H.'s statement would have been excluded had a more specific objection been made.

Opinion 1 at 10.

The state court's conclusion that petitioner's trial counsel did not render ineffective assistance because of his failure to make better or more appropriate objections to the testimony of D.H.'s mother is not an objectively unreasonable application of *Strickland*. As explained above, the state court's conclusion that the evidence was properly admitted under state law is binding on this court. The court has also concluded that the admission of the evidence did not violate petitioner's rights to due process or to confrontation of the witnesses against him. Accordingly, trial counsel's failure to object to the testimony on these grounds was not deficient performance. *See Jones v. Smith*, 231 F.3d 1227, 1239 n. 8 (9th Cir. 2000) (citing *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir.1985)) (an attorney's failure to make a meritless objection or motion does not constitute ineffective assistance of counsel); *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir.1996) ("the failure to take a futile action can never be deficient performance"). Accordingly, petitioner is not entitled to relief on this claim.

111

**d. Failure to Request Jury Instruction on Other Crimes Evidence**

Petitioner claims that his trial counsel rendered ineffective assistance when he failed to request a clarifying instruction after the jury asked a question during deliberations. Pet. at 63-66. He argues that, without such an instruction, the jury may have considered improper character evidence in reaching its verdict. *Id.*; Traverse at 10-11. The California Court of Appeal rejected this claim, reasoning as follows:

Appellant finally argues his trial counsel was ineffective for failure to request clarifying instructions after the jury questioned the court whether “each charge stand[s] by itself or can a decision on [one] charge influence the decision on another charge[?]” The court directed the jury to review CALJIC 17.02. The jury then sent another question: “Regarding 17.02 – we understand that each count must be decided separately – can factors used from one decision be used as a factor in another decision[?]” The court responded: “[Y]es, you could compare and consider all the evidence as it relates to any particular count.” Both attorneys agreed with that response.

Appellant urges that this instruction was inconsistent with CALJIC 17.02. CALJIC 17.02 as given provides: "Each count charges a distinct crime. You must decide each count separately. The defendant may be found guilty or not guilty of any or all of the crimes charged. Your finding as to each count must be stated in a separate verdict." At the outset, we find no inconsistency between CALJIC 17.02 and the court's explanation. The fact that each count must be decided separately does not prevent the jury from considering all the evidence in making each determination. The same testimony certainly may demonstrate guilt of more than one crime.

This case does not present the same situation as *In re Anthony T.* (1980) 112 Cal.App.3d 92, on which appellant relies. There, the allegations that a minor had committed two robberies, about two months apart, of two different restaurants were found true. The minor presented an alibi defense to the first charge, and denied the second charge. He was employed at the second restaurant, and came back twice after the robbery – once at the manager's request. The court noted that the case was close and that the minor “evidences no conduct associated with guilt in either of these instances . . . . [H]owever, if he did commit the September 8 robbery that would be consistent with committing the July 14th robbery . . . .” (*Id.* at p. 101.) Therefore, the record showed that “the trial court used each robbery in deciding whether appellant was guilty of the other.” (*Id.* at p. 102.)

1           Here, the jury was instructed that it must decide each count  
2           separately, and their second note indicates that they understood  
3           that instruction. The court then clarified that the jury “should  
4           compare and consider all the evidence as it relates to any particular  
5           count.” The jury then found appellant guilty of some counts and  
6           not guilty of others. We find no prejudicial error in the trial  
7           court’s instructions, and therefore no ineffective assistance of  
8           counsel in failing to object to those instructions.

9           Opinion 1 at 17-18.

10          Petitioner claims that because of the trial court’s response to the jury’s questions,

11           the danger was thus presented that the jury considered evidence  
12           that appellant was guilty of one count as evidence that he was  
13           disposed to commit another count – i.e., as character evidence.  
14           The judge’s answer to the second question essentially informed the  
15           jury that if it concluded from, for example, the testimony of J.V.  
16           that petitioner molested him, then it could infer from that tendency  
17           that he was likely to have molested R.L., in spite of whatever  
18           reasons there might have been to doubt that. Therefore, it was  
19           necessary to give the jury some additional instruction to guide it in  
20           comparing the evidence of one count with that of another, so that it  
21           would not consider guilt of one offense as guilt of another. For  
22           instance, the judge could have given some variation of CALJIC  
23           No. 2.50, such as: “Evidence of other crimes for which the  
24           defendant is on trial, if believed, may not be considered by you to  
25           prove that defendant is a person of bad character or that he has a  
26           disposition to commit crimes.”

17          Pet. at 63-64. Petitioner argues that the jury may have considered “*all* factors and *all* evidence  
18          from one count in deciding another count,” including “impermissible character evidence.”

19          Traverse at 10.

20          The decision of the state appellate court rejecting this claim of ineffective assistance of  
21          trial counsel is not contrary to or an unreasonable application of *Strickland* and should not be set  
22          aside. There is no evidence that the jury considered improper character evidence in reaching its  
23          verdicts or that the trial court’s response to the jury’s questions would have allowed or  
24          authorized such a procedure. Nor is there any evidence that the jury remained confused about  
25          the correct procedure to follow after receiving the trial court’s responses. The failure of  
26          petitioner’s trial counsel to request further clarifying instructions, under these circumstances,

1 was not outside the wide range of reasonable professional assistance and did not result in  
2 prejudice. *See United States v. Feldman*, 853 F.2d 648, 666 (9th Cir. 1988). Accordingly,  
3 petitioner is not entitled to relief on this claim.

4 **e. Failure to Present Letters of Mitigation at Second Sentencing**  
5 **Proceedings**

6 Petitioner claims that his trial counsel rendered ineffective assistance when he failed to  
7 present letters of mitigation during the sentencing proceedings on remand. Pet. at 100. As  
8 described above, counsel attempted to submit the letters during the original sentencing  
9 proceedings but the trial judge declined to consider them because they were untimely filed. At  
10 the resentencing proceedings, counsel apparently did not attempt to submit the letters in  
11 mitigation.

12 The California Court of Appeal rejected this claim in its decision on both of petitioner's  
13 appeals. In its second decision, the court explained its reasoning as follows:

14 As a separate basis for reversal of his sentence, appellant contends  
15 that the trial court erred in failing to consider, on resentencing, the  
16 letters in mitigation that he submitted belatedly in connection with  
17 his original sentencing. Alternatively, he contends that if this  
18 argument was waived by his counsel's failure to call the letters to  
19 the trial court's attention, his counsel's assistance was ineffective.

20 As already noted, at the outset of the resentencing hearing, the trial  
21 judge listed the materials he had reviewed, which did not include  
22 appellant's letters in mitigation. He then asked whether there was  
23 anything else he should consider, and appellant's counsel  
24 responded "No." It is hard to imagine any clearer record for a  
25 waiver.

26 But there is insufficient evidence that the conduct of counsel in not  
offering the letters was conduct which fell below the standard of  
care. In our prior opinion, we held that appellant's original trial  
counsel's failure to submit the letters sufficiently in advance of  
sentencing was not prejudicial, because "a review of the letters . . .  
leads us to conclude that there is no reasonable probability that  
consideration of the letters would have [led] to a lesser sentence."  
We reached that conclusion because the letters were all premised  
on expressions of appellant's innocence, and "[o]pinions as to the  
innocence of a defendant after a jury has already reached a guilty  
verdict are not a factor in mitigation." (Cf. *People v. Charron*

1 (1987) 193 Cal.App.3d 981, 994, 238 Cal.Rptr. 660 [trial court did  
2 not err in rejecting letters testifying to defendant's good character  
3 as mitigating factor, when qualities spoken of in letters were  
contradicted by defendant's conduct in committing crimes of which  
he was convicted].)

4 *People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1248, 118  
5 Cal.Rptr.2d 890, cited by appellant, is not to the contrary. In that  
6 case, the court held that the trial court had erred in concluding it  
had no discretion to grant probation to a man convicted of  
7 molesting his minor daughters. The court then determined that this  
error made it necessary to remand for resentencing, because  
granting probation would not necessarily constitute an abuse of  
discretion given the defendant's remorse, amenability to treatment,  
good work history, and lack of any criminal record. The court also  
9 mentioned that the defendant had submitted "numerous letters of  
support from family and friends" (*ibid.*), but unlike in this case,  
there is no indication that those letters were premised on the  
defendant's innocence. Except for good work history, the other  
mitigating factors present in *Bruce G.* are not present in this case.

10 Thus, defense counsel's failure to object or argue the text of the  
11 letters in mitigation is understandable because the letters  
12 themselves were not properly mitigating, and we had said as much  
13 in our earlier opinion in *Burbine I*. Moreover, appellant has failed  
14 to point to any facts upon resentencing to alter our earlier  
conclusion that "there is no reasonable probability that the court  
15 would have imposed a lesser sentence" if the judge had reviewed  
the letters. It follows that trial counsel's failure to call them to the  
16 judge's attention prior to the resentencing did not result in any  
prejudice to appellant.<sup>10</sup> (*See People v. Staten* (2000) 24 Cal.4th  
434, 451, 101 Cal.Rptr.2d 213, 11 P.3d 968 [alleged ineffective  
assistance of counsel not grounds for reversal unless appellant  
shows reasonable probability that result would have been different  
but for counsel's errors].) Therefore, even if this waiver  
17 constituted ineffective assistance, this is not a ground for reversal,  
because appellant was not prejudiced. Accordingly, we find no  
basis to reverse appellant's sentence on this ground.<sup>11</sup>

21  
22 <sup>10</sup> For the same reason, we see no reason to fault the trial judge for failing to review them  
23 of his own accord. Our opinion in *Burbine I* clearly implied that this was unnecessary, because  
we held that the letters had no mitigating value.

24 <sup>11</sup> In its decision on petitioner's first appeal, the state appellate court also rejected this  
claim of ineffective assistance of counsel, reasoning as follows:

25 Appellant also argues in his habeas petition that the failure to present the letters  
earlier constituted ineffective assistance of counsel. When "the record contains  
26 no explanation for the challenged behavior, an appellate court will reject the

1 Opinion 2 at 15-17.

2 Petitioner's claim that his trial counsel rendered ineffective assistance at the resentencing  
3 hearing must be rejected. The Ninth Circuit Court of Appeals has concluded that "there is no  
4 clearly established federal law" regarding the standard for ineffective assistance of counsel at  
5 sentencing in noncapital cases. *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1244 (9th Cir.  
6 2005). When the Supreme Court established the test for ineffective assistance of counsel claims  
7 in *Strickland*, the Court expressly declined to "consider the role of counsel in an ordinary  
8 sentencing, which . . . may require a different approach to the definition of constitutionally  
9 effective assistance." *Id.* In the years since *Strickland* was decided, the Supreme Court has not  
10 announced what standard should apply to ineffective assistance of counsel claims in the context  
11 of sentencing proceedings in noncapital cases. *Id.* Because there is no clearly established  
12 United States Supreme Court case which "squarely addresses" this issue, the state court did not  
13 unreasonably apply federal law in concluding that petitioner was not entitled to relief with  
14 respect to this claim. *See Moses v. Payne*, 543 F.3d 1090, 1098 (9th Cir. 2008). Moreover, the  
15 state court's conclusion that trial counsel's actions with regard to the letters in mitigation did not

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16 claim of ineffective assistance "unless counsel was asked for an explanation and  
17 failed to provide one, or unless there simply could be no satisfactory  
18 explanation."'" (*People v. Earp* (1999) 20 Cal.4th 826, 871, citing *People v.*  
19 *Kipp* (1998) 18 Cal.4th 349, 367.) Moreover, appellant must show "a  
20 reasonable probability that, but for counsel's unprofessional errors, the result of  
21 the proceeding would have been different."'" (*People v. Staten* (2000) 24 Cal.4th  
22 434, 451, citing *People v. Ledesma*, *supra*, 43 Cal.3d 171, 217-218.) Here,  
23 nothing in the record indicates when appellant's trial counsel received the letters.  
24 One possible explanation is that he did not receive the letters until after the rule  
25 437 deadline. Moreover, a review of the letters, attached as exhibit D to  
appellant's petition, leads us to conclude that there is no reasonable probability  
that consideration of the letters would have lead to a lesser sentence. The letters  
uniformly express the writers' viewpoints that appellant was not guilty. Opinions  
as to the innocence of a defendant after a jury has already reached a guilty verdict  
are not a factor in mitigation. (See Cal. Rules of Court, rule 423.) Therefore, we  
conclude that even if appellant's trial counsel was ineffective in not presenting the  
letters in a timely fashion, there is no reasonable probability that the court would  
have imposed a lesser sentence.

26 Opinion 1 at 15.

1 result in prejudice to petitioner is not an unreasonable application of *Strickland*. Therefore,  
2 petitioner is not entitled to relief on this claim of ineffective assistance of trial counsel.

3 **3. Cumulative Error**

4 Petitioner claims that he was denied due process as a result of the cumulative impact of  
5 the errors of his trial counsel. The California Court of Appeal rejected this claim with the  
6 following reasoning:

7 Appellant finally urges that he was prejudiced by the cumulative  
8 impact of his trial counsel's "numerous" deficiencies. Under the  
9 "'cumulative errors doctrine'" we must "assess the cumulative  
10 effect of any errors to see if it is reasonably probable the jury  
11 would have reached a result more favorable to defendant in their  
12 absence. [Citations.]" (*People v. Kronemyer* (1987) 189  
Cal.App.3d 314, 349.) We find no cumulative effect here because  
we have already determined that there were no cumulative errors.

12 Opinion 1 at 18.

13 The Ninth Circuit has concluded that under clearly established United States Supreme  
14 Court precedent, the combined effect of multiple trial errors may give rise to a due process  
15 violation if it renders a trial fundamentally unfair, even where each error considered individually  
16 would not require reversal. *Parle v. Runnels*, 505 F.3d 922, 927 (9th. Cir. 2007) (citing  
17 *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) and *Chambers v. Mississippi*, 410 U.S.  
18 284, 290 (1973)). "The fundamental question in determining whether the combined effect of  
19 trial errors violated a defendant's due process rights is whether the errors rendered the criminal  
20 defense 'far less persuasive,' *Chambers*, 410 U.S. at 294, and thereby had a 'substantial and  
21 injurious effect or influence' on the jury's verdict." *Parle*, 505 F.3d at 927 (quoting *Brecht*, 507  
22 U.S. at 637).

23 This court has addressed each of petitioner's claims of ineffective assistance of trial  
24 counsel and has concluded that no error of constitutional magnitude occurred at his trial in state  
25 court. This court also concludes that the alleged errors, even when considered together, did not  
26 render petitioner's defense "far less persuasive," nor did they have a "substantial and injurious

1 effect or influence on the jury's verdict." Accordingly, petitioner is not entitled to relief on his  
2 claim of cumulative error.

3 **4. Right to Notice of the Charges Against Him**

4 Petitioner's next claim is that his due process right to fair notice of the charges against  
5 him and a reasonable opportunity to defend against those charges was violated because: (1) the  
6 date of his alleged molestation of D.H. was not set forth with more specificity in the information;  
7 and (2) there was insufficient evidence introduced at trial that he committed a lewd act upon  
8 D.H. between August 1, 1997, and August 31, 1997, as alleged in the information. Pet. at 57.  
9 Petitioner argues that because he was not given notice of the exact date and time of the unlawful  
10 acts, he "was denied a reasonable opportunity to prepare and present his defense and was taken  
11 by surprise." Traverse at 8. Petitioner, a long-distance truck driver, states that if the indictment  
12 or the trial testimony had been more specific, he may have been able to come up with an alibi or  
13 "might have been able to allege he was away from home during the correct time periods." *Id.* In  
14 essence, the issue presented here is whether petitioner was denied adequate notice of the charges  
15 against him to enable him to present a defense, where the date of the lewd acts committed on  
16 D.H. was never specifically alleged, either in the information or at trial.

17 The California Court of Appeal rejected petitioner's claim in this regard, reasoning as  
18 follows:

19 Appellant argues that there was insufficient evidence to support his  
20 conviction for committing a lewd act on D.H. "[o]n or about and  
21 between August 01, 1997, and August 31, 1997," as alleged in the  
22 information. He maintains that the only evidence as to time frame  
23 was D.H.'s mother's testimony that D.H. made the statements to  
her on August 17, 1997, and suggests that his due process rights  
were violated because he had "no notice of the time when the act  
was alleged to have occurred" and was thereby misled in his  
defense.

24 "Where alibi is not a defense, the prosecution need only prove the  
25 act was committed before the filing of the information and within  
the period of the statute of limitations. [Citation.] This is so  
26 because the precise time of a crime need not be declared in the  
accusatory pleading except where time is a material ingredient of

1 the offense. [Citations.]” (*People v. Obremski* (1989) 207  
2 Cal.App.3d 1346, 1354.) “A variance is immaterial unless time is  
3 of the essence of the offense . . . . The test of the materiality of a  
4 variance is whether the indictment or information so fully and  
5 correctly informs the defendant of the criminal act with which he is  
6 charged that, taking into consideration the proof which is  
7 introduced against him, he is not misled in making his defense, or  
8 placed in danger of being twice put in jeopardy for the same  
9 offense.” (*People v. Amy* (1950) 100 Cal.App.2d 126, 127.)  
10 Contrary to appellant’s claim, *People v. Jones* (1990) 51 Cal.3d  
11 294 did not change the rule of *Amy*, agreeing that “the defendant  
12 has no right to notice of the specific time or place of an offense, so  
13 long as it occurred within the applicable limitation period.” (*Id.* at  
14 p. 317.) “If the jury believed that the offenses did happen on or  
15 about the dates charged and within the limitation period, and  
16 defendant was sufficiently apprised of the approximate dates of the  
17 offenses and was not misled in making his defense or placed in  
18 danger of being twice in jeopardy, no prejudicial error appears.””  
19 (*People v. Jones* (1984) 155 Cal.App.3d 153, 181, citing *People v.*  
20 *Brooks* (1955) 133 Cal.App.2d 210, 212.)

21 While it is true that there was no evidence pinpointing the  
22 particular day on which appellant pulled down D.H.’s pants, the  
23 testimony indicated that it took place during the summer of 1997,  
24 sometime on or before August 17. D.H. spent the weekdays with  
25 his grandparents on Plumb Street during the summer of 1997. The  
26 incident occurred sometime before August 17, 1997, when D.H.  
27 told his mother about it. Moreover, the allegation that the lewd act  
28 on D.H. took place “on or about” August 1997 could not have  
29 misled appellant. Appellant’s defense was credibility of the  
30 witnesses. There was also the suggestion, through the testimony of  
31 Ms. Hansen about the wet pants incident, that D.H. may have  
32 misunderstood an innocent action on the part of appellant. Neither  
33 of these defenses was affected in any way by the failure to allege a  
34 specific date or any variance between the time period alleged and  
35 the time the jury found the offense occurred. We find that there  
36 was substantial evidence supporting the conviction of a lewd act  
37 committed against D.H. “on or about” August 1997.<sup>12</sup>

38 Opinion 1 at 11-12.

39 Petitioner’s claim implicates several provisions of the federal constitution: the right to  
40 notice, the right to present a defense, and the requirement that sufficient evidence support a  
41 conviction. Petitioner’s claim arises from the failure of the information to specify the exact date

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42 <sup>12</sup> We also note that appellant waived his right to a preliminary examination, which could  
43 have provided more specific evidence of the date of the charged offense.

1 and time of the alleged molestation, and the lack of specific testimony on that point at trial.  
 2 Numerous courts have acknowledged that often in cases involving sexual abuse of young  
 3 children, the precise times and dates of the alleged offense or offenses cannot be determined with  
 4 specificity. *See, e.g., Valentine v. Konteh*, 395 F.3d 626, 632, 638 (6th Cir. 2005) and cases cited  
 5 therein (“courts must be aware and responsive to the unique problems of child abuse cases”).  
 6 Nonetheless, the Sixth Amendment guarantees a criminal defendant the fundamental right to be  
 7 clearly informed of the nature and cause of the charges against him in order to permit adequate  
 8 preparation of a defense. *Cole v. State of Ark.*, 333 U.S. 196, 201 (1948). Indeed, “[n]o  
 9 principle of procedural due process is more clearly established than that notice of the specific  
 10 charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are  
 11 among the constitutional rights of every accused in a criminal proceeding in all courts, state or  
 12 federal.” *Id.* *See also Strickland*, 466 U.S. at 685 (“a fair trial is one in which evidence subject  
 13 to adversarial testing is presented to an impartial tribunal for resolution of issues defined in  
 14 advance of the proceeding”); *Jackson v. Virginia*, 443 U.S. 307, 314 (1979) (“[A] conviction  
 15 upon a charge not made . . . constitutes a denial of due process”). The notice provision of the  
 16 Sixth Amendment is incorporated within the Due Process Clause of the Fourteenth Amendment  
 17 and is applicable to the states. *Gautt v. Lewis*, 489 F.3d 993, 1003 (9th Cir. 2007).

18 When determining whether a criminal defendant has received fair notice of the charges  
 19 against him, a reviewing court must begin its analysis by reviewing the content of the  
 20 information or indictment. *Id.*<sup>13</sup> An indictment is constitutionally adequate if it: (1) contains the  
 21 elements of the charged offense; (2) gives the defendant adequate notice of the charges; and (3)

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22  
 23       <sup>13</sup> “The ‘sufficiency of an indictment or information is primarily a question of state  
 24 law.’” *Tapia v. Tansy*, 926 F.2d 1554, 1560 (10th Cir. 1991) (quoting *Franklin v. White*, 803  
 25 F.2d 416, 418 (8th Cir. 1986)). However, the notice provided by a state in a charging instrument  
 26 must comport with the due process guarantee of a fair trial. *See Jackson*, 443 U.S. at 314 (it is  
 “axiomatic” that “a person cannot incur the loss of liberty for an offense without notice and a  
 meaningful opportunity to defend”); *Wilkerson v. Wyrick*, 806 F.2d 161, 164 (8th Cir. 1986)  
 (applying this principle to habeas review of charging instrument).

1 protects the defendant against double jeopardy. *Russell v. United States*, 369 U.S. 749, 763-64  
2 (1962); *Valentine*, 395 F.3d at 631. “It is generally sufficient that the indictment set forth the  
3 offense in the words of the statute itself, as long as ‘those words of themselves fully, directly,  
4 and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to  
5 constitute the offense intended to be punished.’” *Hamling v. United States*, 418 U.S. 87, 117  
6 (1974) (quoting *United States v. Carll*, 105 U.S. 611, 612 (1882)). However, where guilt  
7 depends crucially upon a specific identification of fact, an indictment must do more than simply  
8 repeat the language of the criminal statute; it must also apprise the defendant of the relevant  
9 facts. *See United States v. Cruikshank*, 92 U.S. 542, 558 (1985). The United States Supreme  
10 Court has explained that

11 The object of the indictment is to furnish the accused with such a  
12 description of the charge against him as will enable him to make  
13 his defense, and avail himself of his conviction or acquittal for  
14 protection against a further prosecution for the same cause; and  
15 second, to inform the court of the facts alleged, so that it may  
16 decide whether they are sufficient in law to support a conviction if  
17 one should be had. For this, facts are to be stated, not conclusions  
18 of law alone. A crime is made up of acts and intent; and these must  
19 be set forth in the indictment with reasonable particularity of time,  
20 place, and circumstances.

21 *Id.* The Ninth Circuit Court of Appeals has held that, in certain circumstances, a reviewing court  
22 can examine sources other than the information or indictment for evidence that the defendant  
23 received adequate notice, such as “a complaint, an arrest warrant, or a bill of particulars,” or  
24 “during the course of a preliminary hearing.” *Sheppard v. Rees*, 909 F.2d 1234, 1236 n.2 (9th  
25 Cir. 1990). Adequate notice may also be provided by trial testimony or by jury instructions. *Id.*  
26 at 1235. *See also Stephens v. Borg*, 59 F.3d 932, 934-36 (9th Cir. 1995); *Morrison v. Estelle*,  
981 F.2d 425, 427-29 (9th Cir. 1992).

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1       The charging document against petitioner alleged that “on or about and between August  
2 01, 1997, and August 31, 1997,” petitioner committed a lewd act upon D.H. Clerk’s Transcript  
3 on Appeal (CT) at 12. The prosecution’s trial brief stated that:

4       In August of 1997, 4 year old D.H. told his mother that the  
5 defendant tickled his penis on more than one occasion. D.H. lived  
6 across the street from the defendant. D.H. would visit the  
7 defendant while he worked on his truck and inside the defendant’s  
house. D.H. stated that the defendant pulled his pants down and  
tickled his penis. D.H. also stated he touched the defendant’s  
penis.

8 *Id.* at 23-24.<sup>14</sup> These sources notified petitioner of the approximate date of the alleged incidents,  
9 the victim, and the nature of the incidents with sufficient clarity to enable him to prepare a  
10 defense. As noted by the California Court of Appeal, petitioner’s defense did not depend on the  
11 acts of molestation taking place on any particular date. Rather, petitioner’s defense was that  
12 regardless of the time, date, and manner of the allegations, he never engaged in sexual conduct  
13 with the victims. To the extent petitioner may have had an alibi defense during any part of the  
14 time period alleged in the information, such as a trip out of town, he could have presented it.  
15 The fact that an alibi defense is difficult to assert, or cannot be asserted, does not render the  
16 charge constitutionally deficient. *See Fawcett v. Bablitch*, 962 F.2d 617, 619 (7th Cir. 1992)  
17 (acknowledging that “it is hard to provide an alibi for a six-month period, or even for all the  
18 weekends during that time” but concluding that, nevertheless, defendant was not precluded from  
19 preparing a defense to charges of child abuse). If this were not the case, most crimes of child  
20 sexual assault could not be prosecuted. *See Valentine*, 395 F.3d at 632 (“[c]ertainly, prosecutors  
21 should be as specific as possible in delineating the dates and times of abuse offenses, but we  
22 must acknowledge the reality of situations where young child victims are involved”).

23       ////

24  
25       <sup>14</sup> As noted by the California Court of Appeal, petitioner waived his right to a  
preliminary hearing, which could have provided more particulars as to the dates and times of the  
26 alleged acts.

1       The United States Supreme Court has not determined that an information in a child  
2 sexual abuse case is constitutionally deficient for failure to provide specific dates of incidents.  
3 Several federal circuit courts, however, have so held. *See Valentine*, 395 F.3d at 632 (citing  
4 Seventh and Tenth Circuit cases) (“[t]his Court and numerous others have found that fairly large  
5 time windows in the context of child abuse prosecutions are not in conflict with constitutional  
6 notice requirements.”). A failure to specify the precise dates upon which the alleged crimes  
7 occurred does not deprive a defendant of his constitutional right to due process where time is not  
8 of the essence of the offense and where the dates used are not picked arbitrarily. *See, e.g.*,  
9 *United States v. McCown*, 711 F.2d 1441, 1450-51 (9th Cir. 1983); *United States v. Roman*, 728  
10 F.2d 846, 851 (7th Cir. 1984); *United States v. Hultgren*, 713 F.2d 79, 89 (5th Cir. 1983); *United*  
11 *States v. Morris*, 700 F.2d 427, 429-30 (1st Cir. 1983). Further, it is not necessary to prove that  
12 the offense was committed on the day alleged in the charging document unless a particular day is  
13 an element of the offense, the date of the offense is material to whether it occurred outside of the  
14 statute of limitations, or the defendant is prejudiced. *Ledbetter v. United States*, 170 U.S. 606,  
15 612 (1898); *United States v. Anderson*, 532 F.2d 1218, 1230 (9th Cir. 1976); *United States v.*  
16 *Nunez*, 668 F.2d 1116, 1127 (10th Cir. 1981).

17       This is not a case where an element of the crime was omitted (*Russell*), where a pattern of  
18 government conduct affirmatively misled the defendant and ambushed him by relying on a  
19 different theory of liability at the last minute (*Sheppard*), where an appellate court affirmed a  
20 conviction on a different theory than the one presented to the jury (*United States v. McCormick*,  
21 500 U.S. 257 (1991)), or where petitioner was convicted of a different crime than the one  
22 charged in the indictment (*United States v. Tsihnahjinnie*, 112 F.3d 988, 992 (9th Cir. 1997)).  
23 There is no evidence that the prosecutor here affirmatively misled petitioner. Further, petitioner  
24 did not put forth any evidence to support an alibi defense for any part of the periods alleged and  
25 he had sufficient notice of the specific conduct of which he was accused by virtue of the original  
26 charging documents and the testimony at trial. There is simply no evidence that petitioner was

1 unable to mount a defense because of the lack of a more specific date in the information.  
2 Petitioner's vague claim that "there is simply no way of telling what might have been had the  
3 proper time period been alleged," Traverse at 9, is insufficient to support his due process claim.

4 Because the exact times of the offenses are not material in this case, because they were  
5 not an element of the offense, and because petitioner did not attempt to prove an alibi, the  
6 imprecise charges did not mislead him or violate his right to due process. For these reasons, this  
7 court concludes that petitioner had adequate notice of the charges against him. The state court  
8 opinion rejecting petitioner's claim in this regard is a reasonable construction of the evidence in  
9 this case and is not contrary to or an objectively unreasonable application of United States  
10 Supreme Court authority. *See Woodford v. Visciotti*, 537 U.S. 19, 25 (2002). *See also* 28 U.S.C.  
11 § 2254(d)(1). Accordingly, petitioner is not entitled to habeas relief.<sup>15</sup>

12 **5. Sentencing Errors**

13 Petitioner raises numerous claims related to the sentence imposed on him after the  
14 California Court of Appeal remanded for further sentencing proceedings. Specifically, he claims  
15 that: (1) his right to due process was violated at the resentencing proceedings because the trial  
16 court lacked jurisdiction to increase his sentence on the principal count; (2) principles of  
17

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18 <sup>15</sup> Petitioner does not appear to be making a standard claim that the evidence was  
19 insufficient to support his conviction on the charge involving D.H., but only that there was no  
20 specific evidence that the events took place during the exact time period specified in the  
21 information, thereby denying him the right to adequate notice of the charges against him. *See*  
22 Pet. at 57. Even if he is making a claim of insufficient evidence, it lacks merit. D.H. testified  
23 but was unable or unwilling to remember any acts of molestation. However, his mother testified  
24 that D.H. told her petitioner committed acts of molestation against him on or prior to August 17,  
25 1997. There was also evidence that D.H. stayed at his grandparents' house, who were neighbors  
26 of petitioner, during the summer months. This court recognizes that the evidence of molestation  
against D.H. is not strong and that it consists solely of hearsay testimony. However, considered  
in the light most favorable to the prosecution, a rational jury could find beyond a reasonable  
doubt that the petitioner molested D.H. on or about the time alleged in the information. *See*  
*Jackson*, 443 U.S. at 319 (there is sufficient evidence to support a conviction if, "after viewing  
the evidence in the light most favorable to the prosecution, any rational trier of fact could have  
found the essential elements of the crime beyond a reasonable doubt"). Accordingly, petitioner  
is not entitled to habeas relief on a claim that the evidence was insufficient to support his  
conviction on the charge involving D.H.

1 “fundamental fairness” and res judicata prevented the trial court from increasing the principal  
2 term after he was “acquitted” of the upper term; (3) the trial court abused its discretion and  
3 violated his right to due process when it imposed the upper term after making an implicit  
4 determination that “aggravating factors did not predominate;” (4) his right to due process was  
5 violated when the trial court increased the principal term on resentencing because his “overall  
6 culpability on remand was actually less than before;” (5) the trial court violated his right to due  
7 process by failing to admit letters in mitigation at the resentencing hearing; and (6) improper  
8 factors used in aggravation of his sentence after remand violated his “right to fundamental  
9 fairness in sentencing.” Pet. at 7-8. The California Court of Appeal rejected all of these claims  
10 in a published opinion, reasoning as follows:

11 **A. Imposition of Same Aggregate Term on Remand**

12 The crux of appellant's challenge to the sentence imposed on  
13 remand is that he received no reduction in his aggregate prison  
14 term, despite our reversal of one of the three counts on which he  
15 was originally convicted. He maintains it is unjust that, even  
though he now stands convicted of having molested only two  
children, rather than the original three, he still faces the same  
amount of time in prison as when he was originally convicted.

16 Appellant contends that, given the trial judge's original decision to  
17 impose the middle term for the principal term, the judge could not,  
or should not, have modified the sentence on remand to impose the  
18 upper term for that count, so as to arrive at the same aggregate  
prison term. Appellant advances several alternative legal  
19 arguments in support of his position.

20 We have found no published California opinion addressing  
21 whether a defendant can receive the same aggregate prison term  
upon resentencing for a multi-victim felony conviction where the  
22 only count relating to one of the victims was reversed on appeal.<sup>16</sup>  
As discussed below, however, we conclude that, under principles

23 <sup>16</sup> The closest case appears to be *People v. Calderon* (1993) 20 Cal.App.4th 82, 26  
24 Cal.Rptr.2d 31, which upheld the reimposition of the same term on resentencing following a  
25 partial reversal and remand. In *Calderon*, however, the count that had been reversed on appeal  
26 was a lesser included offense of an affirmed greater offense, not a separate one involving a  
different victim. (See *id.* at pp. 84-85, 26 Cal.Rptr.2d 31.) Nonetheless, we not only agree with  
the result in *Calderon*, but also, for the reasons expressed below, reach the same result in the  
case before us.

already elucidated in the case law, the trial judge's original sentencing choices did not constrain him or her from imposing any sentence permitted under the applicable statutes and rules on remand, subject only to the limitation that the aggregate prison term could not be increased. (*See People v. Craig, supra*, 66 Cal.App.4th at pp. 1447-1448, 78 Cal.Rptr.2d 659.)

### 1. Lack of Jurisdiction to Modify Sentence

First, citing *People v. Karaman* (1992) 4 Cal.4th 335, 14 Cal.Rptr.2d 801, 842 P.2d 100, appellant contends that the trial court lacked jurisdiction to resentence him to the upper term for the continuous sexual abuse count, after having sentenced him to the middle term for that offense prior to the appeal and remand. He argues that "the court cannot modify a sentence, either by increasing it or decreasing it, once the defendant has begun to serve it." In particular, he argues that even where the judgment is reversed as to one count, the trial court on remand does not regain jurisdiction to modify the sentence imposed for counts that were affirmed on appeal. Essentially, appellant's contention is that under *People v. Karaman*, the only alternative left to the trial court upon remand here was to strike that portion of appellant's sentence originally imposed for the count that we reversed in *Burbine I*.

*People v. Karaman*, however, presented the question whether a trial judge retains jurisdiction to modify a defendant's sentence during a brief time period that intervenes, due to a stay of execution, between the entry of the sentence in the minutes and the actual commencement of the defendant's prison term. *Karaman* held that sentencing jurisdiction is retained by the trial court during that period, because the "execution" of the sentence does not occur until the defendant is remanded into custody to begin serving his term. (*Karaman, supra*, at pp. 344-345, 14 Cal.Rptr.2d 801, 842 P.2d 100.)

Therefore, the issue considered and decided by the court in *Karaman* is not relevant to this case, and its holding does not support appellant's argument that the trial court lacked jurisdiction to modify his sentence. It is true that the trial court lost jurisdiction to modify appellant's original sentence when appellant began serving it, but that too is irrelevant, because the trial court regained jurisdiction over appellant's sentence when we remanded the matter for resentencing. (*See, e.g., People v. Hill* (1986) 185 Cal.App.3d 831, 834, 230 Cal.Rptr. 109; *People v. Savala* (1983) 147 Cal.App.3d 63, 70, 195 Cal.Rptr. 193, disapproved on other grounds in *People v. Foley* (1985) 170 Cal.App.3d 1039, 1046, 216 Cal.Rptr. 865.)

Appellant relies on *Karaman* for the proposition that a remand for resentencing vests the trial court with jurisdiction only over that portion of the original sentence pertaining to the count that was

1 reversed, and not over his sentence for the affirmed counts. This  
 2 assumes that a felony sentence for a multiple-count conviction  
 3 consists of multiple independent components, rather than being an  
 4 integrated whole – a view that has been repeatedly rejected by  
 5 other courts that have considered the issue. In *People v. Begnaud*  
 6 (1991) 235 Cal.App.3d 1548, 1 Cal.Rptr.2d 507, for example, the  
 7 court addressed a jurisdictional argument similar to the one  
 8 appellant makes in this case, and rejected it. The court reasoned  
 9 that the “interlocking nature” of felony sentencing under section  
 10 1170.1, subdivision (a), which fixes consecutive subordinate terms  
 11 at one-third the middle term, “compels [the] conclusion” that the  
 12 statute “creates an exception to the general rule that jurisdiction  
 13 ceases when execution of the sentence begins.” (*Id.* at p. 1554, 1  
 14 Cal.Rptr.2d 507, citing *People v. Bustamante* (1981) 30 Cal.3d 88,  
 15 104, fn. 12, 177 Cal.Rptr. 576, 634 P.2d 927; *People v. Bozeman*  
 16 (1984) 152 Cal.App.3d 504, 507, 199 Cal.Rptr. 343.)<sup>17</sup>

17 Other cases have reached much the same conclusion regarding the  
 18 inherently integrated nature of a felony sentence under the current  
 19 statutory scheme. For example, in *People v. Hill, supra*, the court  
 20 opined that “When a case is remanded for resentencing by an  
 21 appellate court, the trial court is entitled to consider the entire  
 22 sentencing scheme. Not limited to merely striking illegal portions,  
 23 the trial court may reconsider all sentencing choices. [Citations.]  
 24 This rule is justified because an aggregate prison term is not a  
 25 series of separate independent terms, but one term made up of  
 26 interdependent components.” (*People v. Hill, supra*, 185  
 Cal.App.3d at p. 834, 230 Cal.Rptr. 109, citing, *inter alia*, *People*  
*v. Savala, supra*, 147 Cal.App.3d at pp. 68-69, 195 Cal.Rptr. 193;  
*see also People v. Castaneda* (1999) 75 Cal.App.4th 611, 613-614,  
 89 Cal.Rptr.2d 367; *People v. Craig, supra*, 66 Cal.App.4th at pp.  
 1450-1452, 78 Cal.Rptr.2d 659; *People v. Calderon, supra*, 20  
 Cal.App.4th 82, 26 Cal.Rptr.2d 31; *People v. Rojas* (1988) 206  
 Cal.App.3d 795, 802, 253 Cal.Rptr. 786.)

27 Yet appellant contends that cases like *Calderon*, which involve  
 28 multiple counts involving crimes against a single victim, are  
 29 inappropriate to this case where our reversal reduced not only the  
 30 number of crimes, but also the number of victims from three to  
 31 two. Appellant argues these circumstances necessarily imply a  
 32 lesser degree of culpability than that perceived at his original  
 33 sentencing hearing, thereby requiring a reduction of his aggregate  
 34 sentence.

35 \_\_\_\_\_  
 36 <sup>17</sup> In *Begnaud*, the count that was reversed on the initial appeal was the one responsible  
 37 for the principal term of the defendant’s sentence, rather than, as here, a count responsible for a  
 38 subordinate term. We do not view this distinction as crucial to the jurisdictional question. In our  
 39 view, the principle that a felony sentence under the Determinate Sentencing Law is an integrated  
 40 whole applies regardless of which element of that whole is invalidated by an appellate reversal.

1 We disagree that the facts of this case constrained the trial court  
2 upon resentencing to make a mandatory reduction in the original  
3 aggregate sentence. We reject appellant's claim primarily because  
4 we endorse the notion that trial courts are, and should be, afforded  
5 discretion by rule and statute to reconsider an entire sentencing  
6 structure in multi-count cases where a portion of the original  
7 verdict and resulting sentence has been vacated by a higher court.  
8 Moreover, to suggest otherwise would potentially encourage trial  
9 courts to take into account the likelihood of certain counts  
10 surviving appeal – a sentencing algorithm which might  
11 unnecessarily lead to longer original sentences.

12 As already noted, case law holds that, based on double jeopardy  
13 and due process, the aggregate prison term imposed for all of the  
14 surviving counts cannot be increased on remand after a partial  
15 reversal, a circumstance appellant does not contend occurred here.  
(*See People v. Craig, supra*, 66 Cal.App.4th at pp. 1447-1448, 78  
16 Cal.Rptr.2d 659.) We do not view these cases as imposing a limit  
17 on the trial court's jurisdiction over resentencing, however. Rather,  
18 they impose a limitation on how the court's sentencing discretion  
19 may be exercised.

20 In accord with this line of cases, we hold that upon remand for  
21 resentencing after the reversal of one or more subordinate counts  
22 of a felony conviction, the trial court has jurisdiction to modify  
23 every aspect of the defendant's sentence on the counts that were  
24 affirmed, including the term imposed as the principal term.

## 25 **2. Equitable Principles of Res Judicata**

26 Appellant next argues that, even if the court regained jurisdiction  
27 to resentence him on the affirmed counts, under the specific  
28 circumstances of this case, the trial court's modification of its prior  
29 sentencing choices violated equitable principles of res judicata that  
30 must be applied here in order to achieve fundamental fairness and  
31 comply with due process. He cites *People v. Mitchell* (2000) 81  
32 Cal.App.4th 132, 96 Cal.Rptr.2d 401 (*Mitchell*) for the  
33 proposition that res judicata applied to the trial court's earlier  
34 decision to impose the midterm for the continuous sexual abuse  
35 count, thereby precluding it from imposing the aggravated term for  
36 that count at resentencing.<sup>18</sup>

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37 <sup>18</sup> Respondent contends that this issue was waived by appellant's failure to raise it in the  
38 trial court. Appellant counters that the issue is one of due process, and therefore can be raised  
39 for the first time on appeal, and that, if the issue was waived, his trial counsel was therefore  
40 ineffective. We need not reach appellant's contentions, because our reading of the record  
41 indicates that appellant's trial counsel adequately preserved this question. At the resentencing  
42 hearing, counsel argued that the court had already considered and rejected the aggravating  
43 factors in the prosecution's brief, and therefore its original finding that there were no aggravating

1           In *Mitchell*, the defendant was convicted of assault with a deadly  
2           weapon, for which he was originally sentenced to a nine-year state  
3           prison term, including a five-year enhancement based upon a true  
4           finding that the defendant had suffered a prior conviction for a  
5           serious felony. (§ 667, subds.(a), (d), & (e); *Mitchell, supra*, 81  
6           Cal.App.4th at p. 136, 96 Cal.Rptr.2d 401.) On appeal, the true  
7           finding was reversed based on ineffective assistance of counsel,  
8           the appellate court concluding the evidence was insufficient to  
9           sustain the prior serious felony allegation. Upon remand, a new  
10           evidentiary hearing was held on the serious felony enhancement,  
11           and the trial court again found the prior serious felony allegation  
12           true. (*Id.* at p. 138, 96 Cal.Rptr.2d 401.)

13           Upon the second appeal, the court in *Mitchell* acknowledged that  
14           principles of double jeopardy do not bar retrial of prior conviction  
15           allegations in a noncapital case. (*Mitchell, supra*, 81 Cal.App.4th  
16           at pp. 139-142, 96 Cal.Rptr.2d 401.) It ruled, however, that a  
17           finding that the evidence does not support an allegation of prior  
18           serious felony is akin to an acquittal of that allegation, concluding  
19           that principles of res judicata and law of the case bar the  
20           prosecution from a second attempt to prove the truth of the  
21           allegation. (*Id.* at pp. 155-156, 96 Cal.Rptr.2d 401.) It reasoned  
22           that “where the government has had a full and fair opportunity to  
23           present its case unhampered by evidentiary error or other  
24           impediment, fundamental fairness requires application of equitable  
25           principles of res judicata (direct estoppel) and law of the case to  
26           preclude the relitigation of [the defendant’s] prior serious felony  
                 conviction allegations for purposes of both a five-year  
                 enhancement and a strike under the three strikes law. [Citations.]”  
                 (*Id.* at p. 136, 96 Cal.Rptr.2d 401.)

First, we find the *Mitchell* holding inapplicable to the present case as the reasoning of the court has no application to a trial court's discretionary sentencing choices.<sup>19</sup> In selecting the middle term as the principal term at the initial sentencing, the trial court here did not, as appellant suggests, “acquit” him of the upper term. It did no more than find that the totality of the circumstances justified the selection of that particular term. Appellant cites no California case holding that it is fundamentally unfair to revisit the term selection issue on remand, after the original circumstances have been altered by the reversal of one count of the original conviction (provided, of course, that the aggregate prison term is not increased). We

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circumstances should stand. The substance of the current argument was thus presented to the trial court.

<sup>19</sup> Indeed, as respondent points out, *Mitchell* itself appears to have contemplated the possibility that, subject to the appellate court's directions regarding striking its true findings on the defendant's priors, the trial court could recalculate the entire sentence as it saw fit. (*People v. Mitchell, supra*, 81 Cal.App.4th at p. 157 & fn. 10, 96 Cal.Rptr.2d 401.)

1 decline appellant's invitation to be the first California court to so  
2 hold.<sup>20</sup>

3 Furthermore, we note that the reasoning in *People v. Mitchell* was  
4 persuasively discredited in *People v. Scott* (2000) 85 Cal.App.4th  
5 905, 102 Cal.Rptr.2d 622, where the court pointed out that (1)  
6 principles of res judicata do not apply until there has been a final  
7 determination on the merits, which does not occur simply because  
8 a finding was made in an ongoing proceeding; (2) in *People v.*  
9 *Morton* (1953) 41 Cal.2d 536, 261 P.2d 523, the California  
10 Supreme Court made it clear that retrial of the question of whether  
11 the defendant had suffered a prior conviction for a particular  
12 offense was entirely proper; and (3) the conclusion that sufficient  
13 evidence does not support an allegation of prior conviction of a  
14 serious felony is not at all analogous to an acquittal, because the  
15 jury does not consider whether the defendant did in fact commit a  
16 serious felony, but decides only the defendant's continuing status.  
17 The court, citing *People v. Monge* (1997) 16 Cal.4th 826, 839, 66  
18 Cal.Rptr.2d 853, 941 P.2d 1121, pointed out that the prosecution is  
19 entitled to reallege and retry that status in as many cases as it is  
20 relevant. (*People v. Scott, supra*, 85 Cal.App.4th at pp. 916-924,  
21 102 Cal.Rptr.2d 622.) In addition, the doctrine of law of the case  
22 does not prevent retrial of an issue, although it does require that  
23 the same conclusion be reached if that matter is retried on the same  
24 evidence. (*Id.* at p. 924, 102 Cal.Rptr.2d 622.) In what might be  
25 described as judicial piling-on, numerous published, as well as  
26 non-published, opinions have since joined the chorus of criticism  
of Mitchell. (*Cherry v. Superior Court* (2001) 86 Cal.App.4th  
1296, 1303-1305, 104 Cal.Rptr.2d 131; *People v. Franz* (2001) 88  
Cal.App.4th 1426, 1455-1456, 106 Cal.Rptr.2d 773; *People v.*  
*Sotello* (2002) 94 Cal.App.4th 1349, 1354-1357, 115 Cal.Rptr.2d  
118.)<sup>21</sup>

17  
18 ////  
19

20 We are not persuaded otherwise by the federal authorities cited by appellant. None of  
21 them holds that res judicata or any other legal principle precludes a trial court, on remand for  
22 resentencing, from reconsidering its prior discretionary sentencing decisions. Moreover,  
23 appellant does not explain how decisions under federal sentencing statutes and rules are relevant  
24 to sentencing under the California determinate sentencing law.

25 The issue whether res judicata or law of the case bars retrial of prior conviction  
26 allegations after a reversal on appeal for insufficient evidence is presently before the California  
Supreme Court. (*People v. Barragan*, review granted May 15, 2002, S105734.) Even if the  
Supreme Court determined in *Barragan* that retrial of prior conviction allegations is barred,  
however, that would not persuade us to accept appellant's argument in this case. As already  
explained, we do not consider the reasoning in *Mitchell* applicable to a trial court's discretionary  
sentencing choices.

### **3. Abuse of Discretion and Use of Improper Aggravating Factors**

In addition to his lack of jurisdiction and res judicata arguments, appellant contends that in imposing the upper term for the principal term at appellant's resentencing, the trial court relied on improper aggravating factors and abused its discretion. In support of this argument, appellant relies in part on the fact that at the original sentencing hearing, when it imposed the middle term, the court expressly considered the same aggravating factors and rejected them as "contained within the charge" of continuous sexual abuse of a child. (*See* rule 4.420(d) ["A fact that is an element of the crime shall not be used to impose the upper term."]; *cf. People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159, 249 Cal.Rptr. 435 [improper to use youth of victim as aggravating factor in child molestation case, because victim's age is element of offense].)

Appellant argues that it was an abuse of discretion for the trial court to change its mind, on resentencing, regarding whether the prosecution's proffered factors in aggravation were contained within the charge. We disagree.

It is established that a circumstance that is an element of the substantive offense cannot be used as a factor in aggravation. (*People v. Wilks* (1978) 21 Cal.3d 460, 470, 146 Cal.Rptr. 364, 578 P.2d 1369; *People v. Clark* (1992) 12 Cal.App.4th 663, 666, 15 Cal.Rptr.2d 709.) A sentencing factor is only an element of the offense, however, if the crime as defined by statute cannot be accomplished without performance of the acts which constitute such factor. (*People v. Clark, supra*, at p. 666, 15 Cal.Rptr.2d 709.) In this case, we are persuaded that the aggravating factors cited by the trial court on resentencing were not in fact elements of the crimes of which appellant was convicted, and therefore were properly considered in aggravation.

Appellant cites *People v. Fernandez* (1990) 226 Cal.App.3d 669, 680, 276 Cal.Rptr. 631, for the proposition that it was improper to rely on the “planning and sophistication” factor (rule 4.421(a)(8)) because it “would . . . probably apply in every resident child molester case.” The court in *Fernandez* went on to say, however, that “further elaboration would be particularly helpful in understanding how and why the facts showing premeditation in this case made the offenses worse than they ordinarily would have been. [Citation.]” (*Id.* at p. 680, 276 Cal.Rptr. 631.)

In the present case, the trial court provided such an elaboration. In support of its finding on resentencing that appellant's crimes were "planned and sophisticated," the court stated that appellant provided his victims with movies and toys "to insure that he remained in [their] good graces" and "to keep them from telling

1 what [was] going on.”<sup>22</sup> Moreover, appellant, unlike the defendant  
2 in *Fernandez*, was a neighbor of his victims rather than a  
3 household member, and therefore not strictly speaking a “resident”  
4 child molester. Under the circumstances, appellant’s having lulled  
5 his victims into acquiescence and silence by cultivating a “friendly  
6 neighbor” relationship with them was distinct from the elements of  
7 the crime, and made appellant’s offenses worse than they otherwise  
8 would have been by manipulating the children’s natural feelings of  
9 gratitude and affection. Thus, we do not find any error in the trial  
10 court’s reliance on planning and sophistication as an aggravating  
11 factor.

12 The trial court also found that appellant “took advantage of a  
13 position of trust that he developed with these young children” (rule  
14 4.421(a)(11)) by “taking them on rides on [his big rig] truck,”  
15 which the evidence at trial showed was equipped with a sleeping  
16 area in which appellant molested one of his victims. Appellant  
17 contends that occupying a position of trust with respect to the  
18 victim is an element of continuous child abuse, and thus that this  
19 factor was not properly aggravating. Appellant’s contention has  
20 been rejected by another division of this court, in an opinion with  
21 which we concur. (*People v. Clark, supra*, 12 Cal.App.4th at p.  
22 666, 15 Cal.Rptr.2d 709.) Section 288.5 requires only that the  
23 perpetrator “either reside[ ] in the same home with ... or ha[ve]  
24 recurring access to the child.” *People v. Clark* held that because  
25 “continuous sexual abuse can be committed by anyone residing in  
26 the same home with the children, whether or not they have special  
status with the victim,” abuse of trust can be used as an  
aggravating factor even against a member of a child’s household.  
(*People v. Clark, supra*, at p. 666, 15 Cal.Rptr.2d 709.) The same  
clearly holds true for non-household members. A neighbor, or a  
housecleaner, gardener, or dog walker employed by a child’s  
parents, for example, might enjoy “recurring access” to a child  
without occupying a position of trust with respect to him or her.

27 In this case, appellant notes that the mother of the continuous  
28 abuse victim actively encouraged what she perceived as a  
29 quasi-paternal relationship between appellant and her child. This  
30 fact bolsters rather than undercuts the trial court’s finding in

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22 <sup>22</sup> Appellant contends that there was no evidence that he bought toys for the victims.  
23 This argument was not raised in the trial court, and is unsupported by any reference to the  
24 record. On the other hand, respondent has not provided us with any citations to the record  
25 indicating that toy buying did occur, and our prior opinion does not mention it. In any event,  
26 even if appellant did not literally buy toys for the victims, the record is clear that appellant took  
the victim of his continuous abuse to the movies and on trips, encouraged him to sleep over at  
his house and in his truck, and allowed him to camp out in his backyard. He also gave candy to  
the other victim. Thus, the record does support the trial court’s underlying point that appellant  
undertook deliberate efforts to insure that he remained in his victims’ good graces and to deter  
them from reporting the abuse.

1 aggravation regarding appellant's position of trust. Appellant's  
2 prolonged deception of the victim's mother concerning the true  
3 nature of his interest in the victim not only is not an element of the  
4 crime, but also did exactly what appellant contends an aggravating  
5 factor should do, i.e., it made this particular crime distinctively  
6 worse than others of its nature.

7  
8 In short, the trial court did not err in considering the cited aspects  
9 of appellant's conduct as aggravating factors. If the trial court was  
10 wrong in rejecting them the first time, as we believe it was, it  
11 cannot have been an abuse of discretion for the court to reconsider,  
12 and correct its own error, after it regained jurisdiction by virtue of  
13 our remand.

14 But even if the reconsideration was error, we would still find no  
15 reason to disturb the sentence that was imposed on remand. Only a  
16 single aggravating factor is required to impose the upper term.  
17 (*People v. Osband* (1996) 13 Cal.4th 622, 728, 55 Cal.Rptr.2d 26,  
18 914 P.2d 640; *People v. Castellano* (1983) 140 Cal.App.3d 608,  
19 614-615, 189 Cal.Rptr. 692.) In this case, the court's decision to  
20 impose the upper term was supported by an aggravating factor that  
21 is beyond reproach and had not been present the first time, namely,  
22 the imposition of a concurrent term for the affirmed subordinate  
23 count, when the sentence for that count could have been imposed  
24 consecutively. (Rule 4.421(a)(7).) Thus, even if the court had  
25 erred in considering the other aggravating factors, the decision to  
26 impose the upper term would still be valid.

27 Appellant argues that the "concurrent term" factor did not really  
28 exist. He notes that the case law already cited (e.g., *People v.*  
29 *Craig*, *supra*, 66 Cal.App.4th at pp. 1447-1448, 78 Cal.Rptr.2d  
30 659) barred the trial court from sentencing appellant to a longer  
31 term on resentencing than the 16 years he originally received. He  
32 argues that the court therefore could not have both imposed the  
33 upper term of 16 years, and made the subordinate term run  
34 consecutively. This is true, but it is also beyond cavil that the  
35 16-year limit would not have prevented the trial court, on remand,  
36 from imposing the 12-year middle term plus a 2-year consecutive  
37 subordinate term. Having chosen, instead, to make the subordinate  
38 term run concurrently, the court was free to use that choice as an  
39 aggravating factor allowing imposition of the 16-year upper term  
40 for the base term.

41 Finally, appellant urges us to reverse on the authority of *People v.*  
42 *Swanson* (1983) 140 Cal.App.3d 571, 574, 189 Cal.Rptr. 547,  
43 which held that a sentencing judge is required to base a choice of  
44 term on the statutory and rule criteria, on an analysis of legitimate  
45 aggravating and mitigating factors, but not on a subjective feeling  
46 about whether the resulting sentence seems too long, too short or  
47 just right. More recent cases, however, have reasoned otherwise,  
48 holding that a judge's subjective belief regarding the length of

1 sentence to be imposed is not improper so long as it is channeled  
2 by the guided discretion outlined in the myriad of statutory  
3 sentencing criteria. (*People v. Calderon, supra*, 20 Cal.App.4th at  
4 p. 88, 26 Cal.Rptr.2d 31; *People v. Stevens* (1988) 205 Cal.App.3d  
5 1452, 1457, 253 Cal.Rptr. 173; *People v. Savala, supra*, 147  
6 Cal.App.3d at p. 69, 195 Cal.Rptr. 193.) The more recent cases are  
7 the more persuasive, but even if they were not, there is nothing in  
8 the record in this case to indicate that, on resentencing, the trial  
9 judge was reasoning backward from a subjectively selected  
10 sentence. On the contrary, the transcript of the sentencing hearing  
11 affirmatively demonstrates that the trial judge “re-reviewed . . . the  
12 probation officer’s report [and] the facts and circumstances of the  
13 case,” and then exercised his sentencing discretion based on an  
14 analysis of legitimate factors.

9 Opinion 2 at 4-15.

10 Petitioner’s claims regarding these sentencing issues were denied by the California Court  
11 of Appeal on state law grounds in a thorough, well analyzed opinion. As discussed below, it is  
12 not the role of this court on federal habeas to review the state court’s analysis of the state law  
13 issues.

14 Federal habeas corpus relief is unavailable for alleged errors in the interpretation or  
15 application of state sentencing laws by either a state trial court or appellate court. “State courts  
16 are the ultimate expositors of state law,” and a federal habeas court is bound by the state’s  
17 construction except when it appears that its interpretation is an obvious subterfuge to evade the  
18 consideration of a federal issue. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). So long as a  
19 state sentence “is not based on any proscribed federal grounds such as being cruel and unusual,  
20 racially or ethnically motivated, or enhanced by indigency, the penalties for violation of state  
21 statutes are matters of state concern.” *Makal v. Arizona*, 544 F.2d 1030, 1035 (9th Cir. 1976).  
22 See also *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) (“[t]he decision whether  
23 to impose sentences concurrently or consecutively is a matter of state criminal procedure and is  
24 not within the purview of federal habeas corpus); *Hendricks v. Zenon*, 993 F.2d 664, 674 (9th  
25 Cir. 1993) (petitioner’s claim regarding merger of convictions for sentencing was exclusively  
26 concerned with state law and therefore not cognizable in a federal habeas corpus proceeding).

1 States sentencing courts have wide latitude in their decisions with regard to punishment.

2 *Brothers v. Dowdle*, 817 F.2d 1388, 1390 (9th Cir. 1987). “Generally, a federal appellate court

3 may not review a state sentence that is within the statutory limits.” *Walker v. Endell*, 850 F.2d

4 470, 476 (9th Cir. 1987). The Ninth Circuit has specifically refused to consider on habeas

5 review claims of erroneous application of state sentencing law by state courts. *See, e.g., Miller*

6 *v. Vasquez*, 868 F.2d 1116 (9th Cir. 1989) (holding that whether assault with a deadly weapon

7 qualifies as a “serious felony” under California’s sentence enhancement provisions is a question

8 of state sentencing law and does not state a constitutional claim). “[A] federal court is limited to

9 deciding whether a conviction violated the Constitution, laws, or treaties of the United States.”

10 *Estelle v. McGuire*, 502 U.S. at 67-68. *See Richmond v. Lewis*, 506 U.S. 40, 50 (1992) (the

11 question to be decided by a federal court on petition for habeas corpus is not whether the state

12 committed state-law error but whether such the state court’s action “so arbitrary or capricious as

13 to constitute an independent due process or Eighth Amendment violation”). *Cf. Fetterly v.*

14 *Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1993) (“the failure of a state to abide by its own statutory

15 commands may implicate a liberty interest protected by the Fourteenth Amendment against

16 arbitrary deprivation by a state”); *Walker*, 850 F.2d at 476 (“we may vacate a sentence, however,

17 if it was imposed in violation of due process”).

18 All of petitioner’s claims regarding the imposition of his sentence on remand were denied

19 by the California Court of Appeal on state law grounds in a thorough and reasoned opinion. The

20 state court’s decision that petitioner’s sentence did not violate state law or the state constitution,

21 derived from its analysis of state law, is binding on this court. *See Lewis v. Jeffers*, 497 U.S.

22 764, 780 (1990) (“federal habeas corpus relief does not lie for errors of state law . . .”).

23 Petitioner has also failed to demonstrate that his sentence violated federal law or that the

24 state court’s decision was contrary to or an unreasonable application of United States Supreme

25 Court authority. The federal cases cited by petitioner in support of his claims of sentencing error

26 are factually dissimilar to the instant case and do not justify habeas corpus relief. *See United*

1 *States v. Oppenheimer*, 242 U.S. 85 (1916) (cited on pgs. 72, 78, 86 of Pet.) (United States  
2 Supreme Court upheld a trial court's reliance on collateral estoppel to dismiss the second  
3 indictment of a defendant whose original indictment had been dismissed for violation of the  
4 statute of limitations); *Ashe v. Swenson*, 397 U.S. 436 (1970) (cited on pgs. 72, 78, 86 of Pet.)  
5 (where defendant was charged in separate counts with robbery of each of six poker players,  
6 where sole issue was whether he was one of the robbers, and was acquitted on a count against  
7 one of the players, federal rule of collateral estoppel, embodied in the Fifth Amendment  
8 guarantee against double jeopardy, precluded subsequent prosecution of defendant for robbery of  
9 a different player); *Poland v. Arizona*, 476 U.S. 147, 157 (1986) (cited on p. 85 of Pet.) (trial  
10 judge's rejection of the "pecuniary gain" aggravating circumstance in death penalty case was not  
11 an "acquittal" of that circumstance for double jeopardy purposes, and did not foreclose  
12 reconsideration of that circumstance by the reviewing court); *Arizona v. Rumsey*, 467 U.S. 203,  
13 212 (1984) (cited on p. 85 of Pet.) (respondent's initial sentence of life imprisonment constituted  
14 an "acquittal" of the death penalty, and barred a retrial on the appropriateness of the death  
15 penalty); *United States v. Mateo-Mendez*, 215 F.3d 1039, 1045 (9th Cir. 2000) (cited on p. 85 of  
16 Pet.) (in a case involving federal sentencing guidelines, remand for resentencing not appropriate  
17 where the trial court's factual findings on the timeliness and completeness of defendant's  
18 confession were unequivocal); *United States v. McElyea*, 158 F.3d 1016, 1021 (9th Cir. 1998)  
19 (cited on p. 85 of Pet.) (matter remanded for resentencing where district court improperly  
20 enhanced defendant's sentence for being an "Armed Career Criminal" pursuant to 18 U.S.C.  
21 § 924(e)(1)); *United States v. Becerra*, 992 F.2d 960, 967 (9th Cir. 1993) (cited on p. 85 of Pet.)  
22 (in case involving federal sentencing guidelines, matter remanded for resentencing where  
23 evidence was insufficient to support trial court's finding regarding the base offense level);  
24 *United States v. Hull*, 792 F.2d 941, 942 -943 (9th Cir. 1986) (cited on pgs. 90, 94, 95 of Pet.)  
25 (noting that "[a] defendant's due process rights are violated when a trial judge relies on  
26 materially false or unreliable information in sentencing" and "[a] sentence must be vacated if it

1 was based on information that lacks ‘some minimal indicium of reliability beyond mere  
2 allegation’’); *United States v. Capriola*, 537 F.2d 319 (9th Cir. 1976) (cited on pgs. 90, 94, 95 of  
3 Pet.) (in view of disparity between sentences imposed upon defendants and upon others involved  
4 in the conspiracy who pled guilty, remand was required to permit district court to either reduce  
5 the sentences or to state the reason for the sentences actually imposed).

6 There is no evidence that petitioner’s sentence on remand was violative of his rights to  
7 due process or the Ex Post Facto Clause, or any other federal constitutional right. *Cf. Farrow v.*  
8 *United States*, 580 F.2d 1339, 1354 (9th Cir. 1978) (approving a procedure whereby federal  
9 judge determines whether, treating challenged prior convictions as invalid, the original sentence  
10 would still be the appropriate sentence). Because petitioner’s challenges to his sentence on  
11 remand do not establish a federal constitutional violation, he is not entitled to habeas corpus  
12 relief on these claims. *See Souch v. Schaivo*, 289 F.3d 616, 623 (9th Cir. 2002) (petitioner’s  
13 sentencing claims insufficient to merit federal habeas relief).

14 **6. Evidentiary Hearing**

15 In a separately filed document, petitioner requests an evidentiary hearing on “certain  
16 factual allegations of the habeas corpus petition.” December 30, 2004 Request for Evidentiary  
17 Hearing on Allegations of Petition for Writ of Habeas Corpus (hereinafter “Request for  
18 Evidentiary Hearing”). Specifically, petitioner requests that the court hear testimony at an  
19 evidentiary hearing from himself; from E. Glynn Stanley, his trial counsel; and from Thomas  
20 Hagler, his counsel at the resentencing proceedings.

21 Petitioner requests testimony from Mr. Stanley on the following subjects: (1) counsel’s  
22 failure to advise petitioner “that there was a way he could testify without exposing himself to  
23 prejudicial impeachment concerning his prior conviction, i.e., that he could testify he once had  
24 an interest in a man or men but no longer did, and that he does not and never did have an interest  
25 in boys;” (2) counsel’s failure to advise petitioner “that the issue of the prior conviction ruling  
26 might not be preserved for appeal if he did not testify;” (3) counsel’s failure to make a more

1 specific objection to the lack of foundation for the testimony of D.H.'s mother and to object to  
2 that testimony on Confrontation Clause grounds; and (4) counsel's failure to ask for a jury  
3 instruction in response to the jurors' questions during deliberations. Request for Evidentiary  
4 Hearing at 2-4. Petitioner requests testimony from Mr. Hagler regarding his failure to present  
5 letters in mitigation from petitioner's friends and neighbors at the resentencing hearing. *Id.* at 4-  
6 5. Petitioner states that he would testify regarding his trial counsel's failure to advise him that  
7 there was a way he could testify without exposing himself to impeachment concerning his prior  
8 conviction, and counsel's failure to advise petitioner that the issue of the prior conviction ruling  
9 might not be preserved for appeal if he did not testify. Petitioner states that "had he been so  
10 advised, petitioner would have testified that the allegations of the complainants in the present  
11 case are not true, the alleged incidents never happened, and he would never do such things with  
12 children." *Id.* at 3. Petitioner argues that the above-described testimony would support his  
13 claims of ineffective assistance of counsel.

14 Pursuant to 28 U.S.C. § 2254(e)(2), an evidentiary hearing is appropriate under the  
15 following circumstances:

16 (e)(2) If the applicant has failed to develop the factual basis of a  
17 claim in State court proceedings, the court shall not hold an  
evidentiary hearing on the claim unless the applicant shows that-

18 (A) the claim relies on-

19 (I) a new rule of constitutional law, made retroactive to cases on  
20 collateral review by the Supreme Court, that was previously  
unavailable; or

21 (ii) a factual predicate that could not have been previously  
discovered through the exercise of due diligence; and

22 (B) the facts underlying the claim would be sufficient to establish  
23 by clear and convincing evidence that but for constitutional error,  
no reasonable fact finder would have found the applicant guilty of  
the underlying offense;

25 28 U.S.C. § 2254(e)(2).

26 ////

1       Under this statutory scheme, a district court presented with a request for an evidentiary  
2 hearing must first determine whether a factual basis exists in the record to support a petitioner's  
3 claims and, if not, whether an evidentiary hearing "might be appropriate." *Baja v. Ducharme*,  
4 187 F.3d 1075, 1078 (9th Cir. 1999). *See also Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir.  
5 2005); *Insyxiengmay v. Morgan*, 403 F.3d 657, 669-70 (9th Cir. 2005). A federal court must  
6 take into account the AEDPA standards in deciding whether an evidentiary hearing is  
7 appropriate. *Schrivo v. Landrigan*, 127 S.Ct. 1933, 1940 (2007). A petitioner must also  
8 "allege[] facts that, if proved, would entitle him to relief." *Schell v. Witek*, 218 F.3d 1017, 1028  
9 (9th Cir. 2000).

10       If the facts do not exist or are inadequate and a hearing might be appropriate, the court  
11 must determine whether the petitioner has "failed to develop the factual basis of a claim in State  
12 court." 28 U.S.C. § 2254(d); *Insyxiengmay*, 403 F.3d at 669-70. A petitioner will only be  
13 charged with a "failure to develop" the facts if "there is lack of diligence, or some greater fault,  
14 attributable to the prisoner or the prisoner's counsel." *Williams*, 529 U.S. at 437 ("comity is not  
15 served by saying a prisoner 'has failed to develop the factual basis of a claim' where he was  
16 unable to develop his claim in state court despite diligent effort."). *See also Palmateer*, 397 F.3d  
17 at 1241 ("an exception to this general rule exists if a petitioner exercised diligence in his efforts  
18 to develop the factual basis of his claims in state court proceedings"). The petitioner must have  
19 "made a reasonable attempt, in light of the information available at the time, to investigate and  
20 pursue claims in state court." *Williams*, 529 U.S. at 435. "Diligence will require in the usual  
21 case that the prisoner, at a minimum, seek an evidentiary hearing in the state court in the manner  
22 prescribed by state law." *Id.* at 437. If the petitioner has failed to develop the facts in state  
23 court, the court must deny a hearing unless the applicant establishes one of the two narrow  
24 exceptions set forth in section 2254(e)(2)(A) & (B).

25       If the applicant has not "failed to develop" the facts in state court, the district court may  
26 proceed to consider whether a hearing is appropriate, or required under *Townsend v. Sain*, 372

1 U.S. 293 (1963). *Baja*, 187 F.3d at 1077. In *Townsend*, the Supreme Court held that a federal  
 2 court must grant an evidentiary hearing to a habeas applicant under the following circumstances:  
 3 (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual  
 4 determination is not fairly supported by the record as a whole; (3) the fact-finding procedure  
 5 employed by the state court was not adequate to afford a full and fair hearing; (4) there is a  
 6 substantial allegation of newly discovered evidence; (5) the material facts were not adequately  
 7 developed at the state-court hearing;<sup>23</sup> or (6) for any reason it appears that the state trier of fact  
 8 did not afford the habeas applicant a full and fair hearing. 372 U.S. at 313. If the petitioner “can  
 9 establish any one of [the *Townsend* factors], then the state court's decision was based on an  
 10 unreasonable determination of the facts and the federal court can independently review the  
 11 merits of that decision by conducting an evidentiary hearing.” *Earp*, 431 F.3d at 1167 (9th Cir.  
 12 2005) (citing *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004)).

13 The next step in determining whether an evidentiary hearing is appropriate is a showing  
 14 that petitioner has a “colorable claim for relief and has never been afforded a state or federal  
 15 hearing on this claim.” *Earp*, 431 F.3d at 1167 (citing *Insyxiengmay*, 403 F.3d at 670;  
 16 *Stankewitz v. Woodford*, 365 F.3d 706, 708 (9th Cir. 2004); and *Phillips v. Woodford*, 267 F.3d  
 17 966, 973 (9th Cir. 2001)). To show that a claim is “colorable,” a petitioner is “required to allege  
 18 specific facts which, if true, would entitle him to relief.” *Ortiz v. Stewart*, 149 F.3d 923, 934  
 19 (9th Cir. 1998) (internal quotation marks and citation omitted). The Ninth Circuit Court of  
 20 Appeals has stressed that a petitioner “only needs to allege a *colorable* claim for relief which is  
 21 ‘a low bar.’” *Earp*, 431 F.3d at 1170 (emphasis in original). Thus, a hearing is required if: “(1)

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23       <sup>23</sup> The fifth factor was overruled in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). In  
 24 *Keeney*, the Court held that a petitioner who failed to develop facts in state court must show  
 25 cause and prejudice. The Supreme Court has held that Congress codified the *Keeney* “failure to  
 26 develop” standard in the first clause of §2254(e)(2). *Williams*, 529 U.S. at 434. Therefore, if  
 petitioner meets the “failure to develop” standard in step one of this analysis, he has satisfied the  
 concerns of *Keeney* and the court may use the fifth factor in determining whether or not to hold  
 an evidentiary hearing.

1 [the petitioner] has alleged facts that, if proven, would entitle him to habeas relief, and (2) he did  
2 not receive a full and fair opportunity to develop those facts [.]” *Williams v. Woodford*, 384 F.3d  
3 567, 586 (9th Cir. 2004). In *Schrivo*, the Supreme Court announced that in determining whether  
4 to grant an evidentiary hearing the federal court must apply the AEDPA deferential standards to  
5 legal and factual questions necessarily reached by the state courts. 127 S.Ct. at 1940. Thus, for  
6 example, if a state court’s conclusion that a petitioner did not suffer prejudice from the actions of  
7 his counsel is not unreasonable, no evidentiary hearing would be necessary. *Id.*

8 The court notes that many of the facts petitioner wishes to establish at an evidentiary  
9 hearing have already been established by the filing of exhibits. The letters petitioner filed that  
10 were between his habeas counsel and his trial counsel (Pet., Ex. E.) show that petitioner's trial  
11 counsel explained his decisions with regard to the admission of petitioner's prior conviction and  
12 petitioner's decision whether to testify. *Id.* Petitioner has included his own declaration, which  
13 covers the same events. Pet., Ex. F. Petitioner has also filed the letters in mitigation which he  
14 argues his counsel should have produced at the sentencing proceedings. Pet., Ex. H. These  
15 exhibits obviate, in part, the need for an evidentiary hearing. As stated in *Williams*, 384 F.3d at  
16 590-591:

We have previously held that a district court in a habeas corpus proceeding “need not conduct full evidentiary hearings,” but may instead “expand the record … with discovery and documentary evidence.” *Watts v. United States*, 841 F.2d 275, 277 (9th Cir. 1988) (per curiam) (denying a habeas corpus petitioner’s contention that the district court erred in resolving a claim based on contradictory affidavits and interrogatories without an evidentiary hearing at which oral testimony could be provided).

\* \* \*

Other circuits have similarly held that “there is a permissible intermediate step that may avoid the necessity of an expensive and time consuming hearing in every [habeas corpus] case. It may instead be perfectly appropriate, depending upon the nature of the allegations, for the district court to proceed by requiring that the record be expanded to include letters, documentary evidence, and, in an appropriate case, even affidavits.” *Chang v. United States*, 250 F.3d 79, 86 (2nd Cir. 2001) (finding no abuse of discretion

1 when the district court dismissed the petitioner's claim without an  
2 evidentiary hearing with live witnesses) (citing *Raines v. United*  
3 *States*, 423 F.2d 526, 529-30 (4th Cir.1970)); see also *Blackledge*,  
4 431 U.S. at 81-82, 97 S.Ct. 1621 ("[A]s is now expressly provided  
5 in the Rules Governing Habeas Corpus Cases, the district judge ...  
may employ a variety of measures in an effort to avoid the need for  
an evidentiary hearing . . . In short, it may turn out . . . that a full  
evidentiary hearing is not required."); *Spreitzer v. Peters*, 114 F.3d  
1435, 1456 (7th Cir. 1997) (same).

6 \* \* \*

7 However, in construing *Blackledge*, our circuit and the Second  
8 Circuit have found no abuse of discretion when the district court  
9 "conclude[d] that [a full evidentiary] hearing would not offer any  
reasonable chance of altering its view of the facts." *Chang*, 250  
F.3d at 86; *Watts*, 841 F.2d at 277 (finding that, in the case at  
hand, the issue of credibility could be conclusively decided on the  
basis of documentary testimony and evidence in the record).

11 Fair and complete consideration of petitioner's claims can and is being had by  
12 considering the record, along with the exhibits supporting his claims of ineffective assistance of  
13 counsel. An evidentiary hearing is not necessary to further develop the facts of petitioner's  
14 claims. In addition, for the reasons described above, petitioner has failed to demonstrate that his  
15 counsel's actions constitute deficient performance or that he suffered prejudice as a result. Even  
16 assuming the truth of the facts petitioner seeks to introduce at an evidentiary hearing, he could  
17 not obtain federal habeas relief because the state court's decision that petitioner's counsel did not  
18 render ineffective assistance is not an unreasonable determination of the facts under  
19 § 2254(d)(2). *See Schriro*, 127 S.Ct. at 1944. For these reasons, an evidentiary hearing is not  
20 appropriate in this case.

21 Accordingly, it is hereby ORDERED that petitioner's December 30, 2004 request for an  
22 evidentiary hearing is denied.

23 Further, it is hereby RECOMMENDED that petitioner's application for a writ of habeas  
24 corpus be denied.

25 These findings and recommendations are submitted to the United States District Judge  
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days

1 after being served with these findings and recommendations, any party may file written  
2 objections with the court and serve a copy on all parties. Such a document should be captioned  
3 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections  
4 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
5 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

6 DATED: July 15, 2009.

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8 EDMUND F. BRENNAN  
9 UNITED STATES MAGISTRATE JUDGE  
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